



Eugene Hearings Official

AGENDA

Phone: 541-682-5377
www.eugene-or.gov/hearingsofficial

Meeting Location:
Atrium Building – Sloat Room
99 West 10th Avenue

The Eugene Hearings Official welcomes your interest in this agenda item. Feel free to come and go as you please at any of the meetings. This meeting location is wheelchair-accessible. For the hearing impaired, FM assistive-listening devices are available or an interpreter can be provided with 48 hours notice. To arrange for these services, contact the Planning Division at (541)682-5481.

WEDNESDAY, February 12, 2014
(5:00 p.m.)

I. PUBLIC HEARING ON APPEAL OF PLANNING DIRECTOR'S DECISION

Willamette Oaks Phase V (MDA 13-2)

Assessors Map: 17-04-24-10

Tax Lot: 1701 and 1702

Decision: Final Planned Unit Development modification to extend the approved time schedule

Appellant: Michael Robinson, Perkins Coie, LLC. for Goodpasture Partners LLC

Lead City Staff: Becky Taylor, Associate Planner
Telephone: (541) 682-5437
E-mail: becky.g.taylor@ci.eugene.or.us

Public Hearing Format:

1. Staff introduction/presentation
2. Public testimony from applicant and others in support of application.
3. Comments or questions from interested persons who neither are proponents nor opponents of the proposal.
4. Public testimony from those in opposition to application.
5. Staff response to testimony.
6. Questions from Hearings Official.
7. Rebuttal testimony from applicant.
8. Closing of public hearing.

The Hearings Official will not make a decision at this hearing. The Eugene Code requires that a written decision must be made within 15 days of close of the public comment period. To be notified of the Hearings Official's decision, fill out a request form at the public hearing or contact the lead City staff as noted above. The decision will also be posted at www.eugene-or.us/hearingsofficial.



MEMORANDUM

Date: February 4, 2014

To: Ken Helm, Hearings Official

From: Gabe Flock and Becky Taylor, City of Eugene Planning Division

Subject: **Appeal of PUD Modification for Willamette Oaks Retirement Center (MDA 13-2)**

Background

The subject appeal pertains to the Planning Director's approval of a modification to a PUD for extension of the construction timeline. The PUD was originally approved in 1986 (see PD 86-1). Between the original approval and the subject modification, the PUD has been modified several times (see MD 89-18, MDA 00-6, MDA 00-15, MDA 03-11, and MDA 07-1), primarily to provide timeline extensions to the construction schedule. Phase V is the remaining portion of the PUD to be developed and is the subject of the present appeal. With regard to timing, the Final PUD (same file number as the tentative stage, PD 86-1) required the following as a condition of approval:

A specific schedule indicating number of phases, construction to be completed during each phase, and time period of each phase, must be submitted by the applicant. Absent an approved schedule as specified, and per Eugene Code 9.510(4), the applicant shall be required to obtain all approvals for necessary building permits within one year of the decision date of this final approval of Phase V development. The final executed PUD agreement shall further specify the time schedule by which all construction shall be completed.

The PUD performance agreement for Phase V was executed in 1997, which satisfied this condition and established the construction schedule for commencement by April 15, 1999, and completion by September 17, 2001. The time schedule for construction of Phase V was then subsequently extended by several additional modifications, each of which was approved by the City. The PUD approval was also extended by Ordinance No. 20440, passed in 2009, which further extended those dates to August 1, 2013 and August 1, 2014 respectively.

The applicant filed another request (MDA 13-2) for modification to extend the timeline on July 31, 2013, which is the subject of the present appeal. On December 20, 2013, the Planning Director granted modification approval to extend the timeline for Phase V to June 9, 2014, with completion of construction by June 9, 2015.

For background, staff notes that the Planning Director initially denied the timeline extension requested by the applicant in 2000 (MDA 00-6), which was reversed by the Hearings Official (HO) on appeal. The Planning Director's denial was primarily based on a determination that the modification would not remain consistent with the applicable permit criteria because pertinent code standards had changed since the PUD was originally approved. The intent of the denial was to "prevent continued, multiple extensions" to the schedule for completing the PUD based on significant changes to the land use code, and the significant time that had elapsed since the original PUD was approved and public notice of the proposal was provided.

In that appeal, the HO's reversal of the Planning Director's decision includes several important determinations that are worth noting as context in the present appeal. Perhaps most importantly, and one that the City firmly agrees with to this day, is that the terms of the PUD agreement are not a condition of approval under which the modification request is to be evaluated. In essence, the executed performance agreement is a contract between the developer and the City that formalizes the terms of certain land use approvals issued under the land use code. It is the code that dictates the approval criteria and standards relating to expiration, and the agreement simply memorializes those code provisions as applied to a given land use approval. The HO also concluded that the Planning Director's denial was based on discretion and reasoning outside the scope of the approval criteria with regard to preventing multiple extensions. She found that those concerns would need to be addressed legislatively through code amendments and could not be resolved through a modification request. Staff notes that no such amendments have occurred with respect to limiting the overall number of such PUD modifications, or the amount of time that may be requested.

It is also notable the HO's determinations in MDA 00-6 were made in the context of applying code provisions in effect at the time, prior to the City's Land Use Code Update in 2001 which did change the process and approval criteria for modifications to existing land use approvals. Essentially, those code amendments in 2001 eliminated the distinction between major and minor modifications, and changed the criteria for all modifications to eliminate the provision requiring that they "remain consistent with all applicable permit criteria".

As addressed in the Planning Director's decision here, under the current code provisions and Type II procedures for considering the present modification request, the only applicable approval criteria are found at Eugene Code (EC) 9.8370(1) and (2). These are the "corresponding provision(s) of any future such law" mentioned in the time schedule of the original PUD agreement, which replaced the old code modification provisions. Those code amendments did not include any provisions that would limit an applicant's ability to further extend an approval timeline; as noted previously, no such amendments have occurred since this issue was addressed by the HO in MDA 00-6.

Notice and Appeal

On December 24, 2013, notice of the decision granting the modification approval (MDA 13-2) was provided in accordance with the Type II application procedures at EC 9.7220. On January 6, 2014, Michael Robinson filed an appeal of the Planning Director's decision on behalf of Goodpasture Partners, LLC, which owns adjacent property.

The appellant argues that the Planning Director “improperly approved the construction time extension request.” The appellant asserts that they will be adversely affected by the development of the “outdated PUD, which originally received tentative PUD approval 27 years ago, and which received final Phase V PUD approval 16 years ago.” (See page 1 of the appellant’s written statement, which is included as Attachment B.) The appeal statement identifies seven assignments of error, which are outlined below and include staff’s response.

The public hearing for this appeal is scheduled for February 12, 2014 and public notice of the appeal hearing was mailed in accordance with applicable code requirements on January 23, 2014. As described in the public notice, the decision on this modification appeal is subject to the procedural requirements of EC 9.7600 through 9.7635, and the public hearing for this appeal will be conducted according to quasi-judicial hearing procedures in state law and described at EC 9.7065 through 9.7095. Pursuant to EC 9.7630, the HO shall affirm, reverse, or modify the Planning Director’s modification approval. EC 9.7630(2) clarifies that the HO can only reverse or modify the Planning Director’s decision if he finds that the Planning Director failed to properly evaluate the application or make a decision consistent with the approval criteria.

Since the submittal of the appeal, staff has received no additional testimony in response to the public notice. Any written testimony or other evidence submitted between the date of this memorandum and the appeal hearing will be forwarded for consideration as part of the decision on this appeal. In addition to any public testimony or other evidence that may be forwarded or presented at the upcoming public hearing, please review the attached items from the application file.

Appeal Issues and Staff Response

The appellant identifies seven assignments of error in the written appeal statement, which are summarized below (in **bold**), followed by staff’s response.

- 1. The Director erred in concluding that the criteria in EC 9.516(9) (1971), which expressly regulates modifications to the PUD Agreement, do not constitute the applicable approval criteria governing Willamette Oaks’ application.**

The performance agreement for Willamette Oaks PUD includes a provision that sets the time schedule for commencement and completion of construction. Paragraph 1.a. of the original Phase V agreement required that construction commence by April 15, 1999, and that total construction be completed on or before September 17, 2001. As noted previously, these dates were extended by several subsequent modifications to the time schedule that were all approved by the City. Ordinance No. 20440 further extended those dates to August 1, 2013 and August 1, 2014, respectively.

The Planning Director found that the present request for a timeline extension would require approval of a PUD modification. That finding is based on language found in the PUD expiration provisions, EC 9.7230(5). A final PUD approval is effective for 36 months after the effective date of approval. EC 9.7230(5) provides that the commencement or expiration dates can be extended if the applicant submits a “modification” requesting such change. The City has interpreted that language to require a modification to the PUD, subject to the criteria set forth in EC 9.8370, in order to extend a timeline, even if that timeline only appears in a performance agreement.

Provision 2 of the related performance agreement includes an important clarification worth noting here, as follows: “Any additions, deletions, or modifications of this Agreement, including the exhibits, are subject to provisions of Section 9.516(9) of the Eugene Code, 1971 (or the corresponding provision of any such future law).” Underline and italics added for emphasis. Mr. Robinson asserts that “there is no corresponding provision in the present code addressing the modification of a PUD agreement.” He states that EC 9.8370 regulates modifications to an approved PUD itself, whereas the subject request is to modify the construction schedule of the PUD agreement. (See page 3 of appeal statement.) Mr. Robinson also refers to his letter dated December 6, 2013, which was submitted during the public comment period prior to the Planning Director’s decision (see Attachment D.)

In his December 6, 2013 comments, Mr. Robinson asserted that the modification is subject to old code provisions at EC 9.516(9), in effect at the time of the original approval, which included a requirement that the proposal “will remain consistent with the applicable permit criteria.” The Planning Director disagreed.

The old code provisions in EC 9.516(9) do not apply here as asserted in Mr. Robinson’s testimony, and described previously above. Appellant is correct that EC 9.516(9)(1971) fell under a section related to modification of performance agreements, and EC 9.8370 relates to modifications of approved PUD’s. However, as explained above, the current code requires time extensions to be processed as PUD modifications under EC 9.8370. Accordingly, EC 9.8370 is the current corresponding version of EC 9.516(9), pursuant to Provision 2 of the performance agreement. Under EC 9.8370, the applicant need not demonstrate that the modification “will remain consistent with the applicable permit criteria,” because that requirement was eliminated as a result of the City’s Land Use Code Update through code amendments occurring in 2001.

2. The Director’s decision is not supported by substantial evidence in the whole record or adequate findings to support the conclusion that the PUD modification satisfies EC 9.516(9)(e)(1) (1971).

This assignment of error relies on an affirmation of Appeal Issue 1, regarding the applicable code criteria. As such, the appellant asserts that the Planning Director failed to make findings of compliance with the old code criteria. Staff disagrees for the reasons provided under Appeal Issue 1, and concludes that no findings need to be made with respect to the old code criteria for modifications.

3. The Director erred by failing to acknowledge, analyze, and provide findings demonstrating compliance with the criteria for extension of the construction schedule pursuant to the Phase V PUD Agreement.

The appellant asserts that EC 9.7320(5) does not expressly regulate or otherwise authorize extensions to PUD construction time schedules. Staff notes that EC 9.7230(5) Expiration confirms that prior to the expiration date, the applicant may submit a modification requesting a change to the commencement or expiration time period.

The appellant also claims that a prior modification (MDA 07-1) removed the ability to extend the time schedule. Just because the modified agreement simplified the time schedule language does not mean that the applicant cannot utilize EC 9.7230(5) to extend the timeline through a modification application. Again, the City views the appellant's reasoning as perhaps creative, but unpersuasive and legally incorrect.

4. The Director erred by finding that the restrictions on time extensions under EC 9.7020 were inapplicable and conflicted with EC 9.7320.

The appellant asserts that the Planning Director erred in determining that the 245-day limitation on time extensions at EC 9.7020 was not implicated in the modification application. The appellant argues that the plain language of the provision means that, because the total of all extensions already greatly exceeds the code's 245-day limit, no additional extensions may be granted. Again, the appellant also mistakenly relies on a distinction between the PUD approval and the agreement, to suggest that the applicant cannot utilize the modification provisions in EC 9.7320(5) and corresponding provisions at EC 9.8370, to extend the expiration period.

The cited provision, EC 9.7020, is found in the portion of EC Chapter 9 titled Application Procedures. It is immediately preceded by a section titled Application Completeness Review (EC 9.7015), which includes language that implements the statutory provisions related to the 120-day rule. Given its placement directly following EC 9.7015, it is clear that the 245-day time frame found in EC 9.7020 was meant to mirror ORS 227.178(5).¹

Further, the appellant's interpretation of EC 9.7020 is not supported by the legislative history of that provision, which confirms that the intent was to parallel state statutes relating to the 120-day rule. Appellant's interpretation would cause an absurd result when taken in context with the provisions of EC 9.7320(5) and EC 9.8370, which otherwise allow an applicant to modify the PUD approval to extend the expiration periods. As described previously, the code has never been amended with the intent to limit the number of, or amount of time included in, such modification requests. The provision added to the code at EC 9.7020 maintains consistency with statutes that limit the amount of time extensions that may be granted under the statutory 120-day rule (i.e. for an on-going, initial application process); not surprisingly, the math shows that the total of 120 days with the maximum amount of time extensions granted (245 days) equals 365 days; this mirrors the language in ORS 227.178 concerning the 120-day rule.

As relevant here, only as it relates to the applicant's Type II request for PUD modification, no time extensions have been requested by the applicant or otherwise granted by the City with respect to the 120-day rule or EC 9.7020. The simple result is that the final local decision on this current Type II application (including this appeal) is due from the Hearings Official no later than March 12, 2014, based on the date the application was deemed complete on November 12, 2013.

¹ ORS 227.178(5) provides, in relevant part: "The 120-day period set in subsection (1) of this section may be extended for a specified period of time at the written request of the applicant. The total of all extensions * * * may not exceed 245 days."

Again, the City views the appellant's reasoning as perhaps creative, but unpersuasive and legally incorrect.

5. The Director erred in concluding that the modification is consistent with the original conditions of approval as required by EC 9.8370(1) and EC 9.516(9)(e)(1)(a) because the Director: (1) misconstrued the plain language of Condition 1(d); and (2) imposed a new condition that modifies Condition 1(d).

Condition 1(d) is recited above and on page 7 of the written appeal statement. Essentially, this condition required the applicant to provide a specific time schedule. This condition was met as part of the final PUD process, which established the initial time schedule in the PUD performance agreement. As relevant here, the HO determined long ago in the context of a prior appeal (MDA 00-16) that this condition has already been satisfied. The appellant asserts that the condition does not grant the City any discretion to grant extensions to that schedule; staff notes that the condition does not explicitly preclude extensions. As discussed above, EC 9.7320 expressly allows applicants to extend PUD expiration dates through the modification process.

The appellant further states that even if EC 9.7230(5) applied, it does not supersede the conditions of approval. Staff agrees. The modification approval criteria require compliance with the original conditions of approval, and in this case, the original condition of approval was satisfied long ago as part of the final PUD approval. The appellant further misconstrues the resulting time schedule language in the PUD agreement as if it were an immovable, insurmountable condition of the original approval. As discussed previously, it is not, and cannot be interpreted in the way the appellant suggests while giving proper meaning to all of the relevant, related current code provisions that govern modifications to extend the expiration period.

The appellant also asserts that the Planning Director erred in imposing a new condition allowing an amendment to the PUD agreement and construction schedule as a means of complying with the original approval condition 1(d). The appellant claims that this is modifying the original condition, whereas the modification approval criteria require consistency with the original conditions. The additional condition was intended as a means of ensuring consistency with the original condition, since that original condition was fulfilled through the PUD performance agreement. Here, to the extent that the Planning Director may have erred in making that condition of approval, as a means to ensure consistency with the original condition of approval and further, as a means to ensure that the extended time schedule is memorialized in an updated agreement, it should be stricken on appeal. The applicant would be required to do so anyway, based on the requirements for Performance Agreements at EC 9.7025(6), with or without the condition of approval, so the issue is moot.

6. The Director erred in concluding that the application satisfies EC 9.8370(2) and EC 9.516(9)(e)(1)(b) when the only evidence in the record refutes this conclusion.

As discussed under Appeal Issue 1, staff disagrees with the appellant concerning applicability of old code provisions. EC 9.8370(2) requires the modification to result in insignificant changes to the physical appearance of the development, the use of the site, and impacts on surrounding properties. Staff affirms that the modification involved no changes to the site plan; hence the modification does

not change the development plan that approved the physical appearance and use of the site, which was the basis for determining impacts on surrounding properties.

The appellant asserts that the most recent site plans filed with the City indicate significant changes. The modification application did not request any site plan changes, nor did the Planning Director's decision authorize any site plan changes. The only active development permit for Phase V is an Erosion Prevention permit, which can be extended annually with a fee. The appellant requests, if the HO affirms the Planning Director's decision, that an additional condition be imposed to require building permits to be consistent with the Phase V PUD plans. Such a condition is unnecessary, as all permits are reviewed for consistency with approved land use decisions. Further, since the appellant's request to make such a condition clearly falls outside the scope of the present application for a time extension only, and therefore is not relevant under the modification approval criteria in this case, the authority to make such a requirement does not exist.

7. The Director erred in approving the modification request because the 16-year old Phase V of the Willamette Oaks PUD is stale due to significant changes in applicable facts and law. Further Willamette Oaks has abandoned and discontinued any vested right it had to complete and continue what is now a nonconforming development.

The appellant states that the Phase V PUD is not vested to develop under the building code and floodplain standards in effect in 1990 or 1997, and further, that there is no evidence that Phase V of the PUD as originally approved could comply with the new building code and floodplain standards. As such, the appeal asserts that continuing to extend the timeline is a pointless exercise because it may never be able to be built as originally approved. The appellant further claims that Phase V is a nonconforming development that has been discontinued based on no construction, and that changes to the surrounding properties and changes in factual and legal circumstances warrant denial of the timeline extension. These arguments appear to be a last-ditch effort to assert some sort of error, again, well outside the scope of the present request and modification approval criteria. Furthermore, the HO dispensed with similar arguments made by the City in reversal of the Planning Director's denial of MDA 00-16. Similar to the appellant's arguments above, concerning site plans filed with the City for a subsequent building permit review, this appeal is not the forum for resolving any alleged inconsistencies between a building permit and the final PUD approval. Those issues would need to be addressed through enforcement of the final PUD requirements as part of the building permit review.

Staff Recommendation

Based on the available evidence, and consistent with the preceding findings and specific clarifications provided in response to the appeal issues raised, staff concludes that the Planning Director's decision was not in error or otherwise inconsistent with the applicable modification approval criteria at EC 9.8370.

With the additional findings provided by staff and absent additional testimony or evidence to indicate otherwise, as of the date of this report, staff recommends that the Hearings Official affirm the decision of the Planning Director granting modification approval for Willamette Oaks PUD, Phase V (MDA 13-2).

Attachments

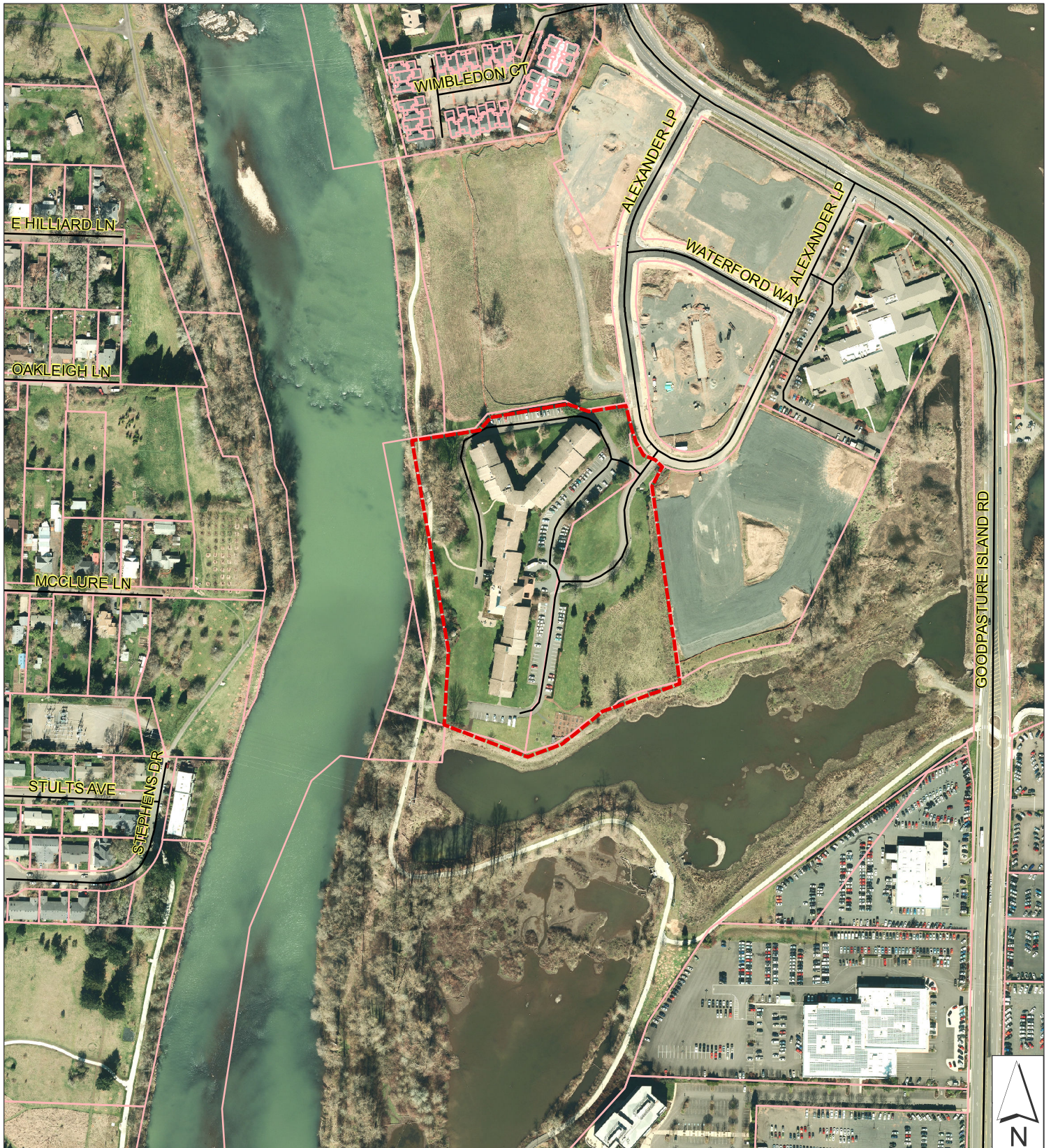
- A: Air Photo
- B: Appeal Form and Written Statement
- C: Decision of the Planning Director for Willamette Oaks (MDA 13-2)
- D: Appellants December 6, 2013 testimony
- E: Decision of the Hearings Official for Willamette Oaks (MDA 00-6)

The full application file will be made available at the public hearing on this matter, and is otherwise available for review at the Eugene Planning Division offices. Staff is forwarding the Hearings Official a copy of all relevant application materials, testimony and related evidence in the record to date.

For More Information

Please contact Becky Taylor, Associate Planner, Eugene Planning Division, by phone at (541) 682-5437 or by e-mail, at becky.g.taylor@ci.eugene.or.us.

Vicinity Map



Legend

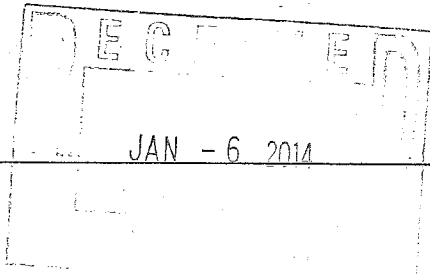
- Streets
- Taxlots

0 120 240 480 Ft

Caution:
This map is based on imprecise
source data, subject to change,
and for general reference only.

January 22, 2014





**Planning & Development
Planning**

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APPEAL OF PLANNING DIRECTOR'S DECISION

This appeal form applies to appeals of interpretation of this Land Use Code made according to EC 9.0040(1) and to appeals to all Type II land use applications. The appeal of the Planning Director's decision provides for a review of an administrative decision by a higher review authority specified in this Land Use Code. The Planning Director's decision may be affirmed, reversed, or modified.

Please check one of the following:

Adjustment Review <input type="checkbox"/> Minor <input type="checkbox"/> Major <input type="checkbox"/> Code Interpretation <input type="checkbox"/> Hazardous Materials Review Historic Property <input type="checkbox"/> Alteration <input type="checkbox"/> Demolition <input type="checkbox"/> Moving <input type="checkbox"/> Variance	Modification <input type="checkbox"/> Conditional Use Permit <input checked="" type="checkbox"/> Planned Unit Development. <input type="checkbox"/> Site Review <input type="checkbox"/> Willamette Greenways Partition <input type="checkbox"/> Tentative Plan <input type="checkbox"/> Final Plat Planned Unit Development, <input type="checkbox"/> Final <input type="checkbox"/> Site Review	<input type="checkbox"/> Standards Review Subdivision <input type="checkbox"/> Tentative Plan <input type="checkbox"/> Final Plat <input type="checkbox"/> Traffic Impact Analysis Vacation <input type="checkbox"/> Improved Public R-O-W <input type="checkbox"/> Improved Public Easement <input type="checkbox"/> Unimproved Public R-O-W with Re-dedication
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City File Name: Modification of time schedule for Willamette Oaks PUD, Phase V

City File Number: MDA 13-2

Date of Planning Director Decision: December 20, 2013

Date Appeal Filed: January 6, 2014

(This date must be within 12 days of the date of the mailing of the Planning Director's decision.)

☒ Attach a written appeal statement. The appeal statement shall include a written statement of issues on appeal and be limited to the issues raised in the appeal. The appeal statement shall explain specifically how the Planning Director's decision is inconsistent with applicable criteria. Please contact staff at the Permit and Information Center, 99 West 10th Avenue, (541) 682-5377, for further information on the appeal process.

- ☒ A filing fee must accompany an appeal of a Planning Director decision, with some exceptions for neighborhood groups. The fee varies depending upon the type of application and is adjusted periodically by the City Manager. Check with Planning staff at the Permit and Information Center to determine the required fee or check on the web at: www.eugeneplanning.org

Acknowledgment

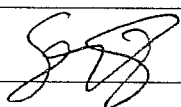
I (we), the undersigned, hereby acknowledge that I (we) have read the above appeal form, understand the requirements for filing an appeal of a planning director decision, and state that the information supplied is as complete and detailed as is currently possible, to the best of my (our) knowledge.

APPELLANT

Name (print): Goodpasture Partners, LLC
c/o Michael C. Robinson Phone: 503-727-2264

Address: 1120 NW Couch St., 10th Floor

City/State/Zip: Portland, OR 97209-4128

Signature: 

APPELLANT

Name (print): N/A Phone: _____

Address: _____

City/State/Zip: _____

Signature: _____

IF this appeal is being filed by the affected recognized neighborhood association, complete the following:

Name of Association: _____

**BEFORE THE HEARINGS OFFICIAL
FOR THE CITY OF EUGENE, OREGON**

In the Matter of an Appeal by Goodpasture Partners, LLC of a Decision by the Planning Director Modifying the Time Schedule for Phase V of the Willamette Oaks PUD (City File No. MDA 13-2))))))))	WRITTEN STATEMENT IN SUPPORT OF APPEAL
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1. Introduction.

Goodpasture Partners, LLC ("Goodpasture") submits this appeal of the December 20, 2013 decision by the City of Eugene ("City") Planning Director ("Director") modifying the construction time schedule for Phase V of the Willamette Oaks PUD ("PUD") (City File No. MDA 13-2). The Director improperly approved the construction time extension request. For the reasons explained below, the Hearings Official should reverse the Director's decision, find that the request to extend the construction time schedule for Phase V of the PUD fails to comply with all applicable approval criteria, and deny the request to extend the Phase V PUD construction time schedule. This appeal is timely filed prior to the deadline of January 6, 2014, at 5:00 p.m.

2. Reason for Appeal.

Goodpasture owns real property that is adjacent to the PUD, and Goodpasture has been and will be adversely affected by the development of the outdated PUD, which originally received tentative PUD approval 27 years ago, and which received final Phase V PUD approval 16 years ago.

3. Procedural History.

The City originally approved the PUD on April 15, 1986. The City approved a Major Modification to the PUD in 1990 to allow Phase V to develop as an assisted living facility with 80 units. Final PUD approval for Phase V was approved by the hearings officer with conditions on September 4, 1997. As part of the approval, Curtis Reeve and the City of Eugene entered into a "Planned Unit Development Agreement" in November 1997 ("Phase V PUD Agreement"). The Phase V PUD Agreement established a construction schedule providing as follows:

"Time being of the essence, the construction will commence by April 15, 1999, and total construction, including landscaping, shall be completed on or before September 17, 2001." (Emphasis added).

The City subsequently extended the construction schedule for Phase V on multiple occasions through quasi-judicial applications initiated by the PUD developer (*see* City File Nos. MDA 00-6, MDA 00-15, MDA 03-11, and MDA 07-1). The most recent extension (MDA 07-1) required that construction commence by August 1, 2010 and be completed no later than August 1, 2011. On November 10, 2009, the Eugene City Council adopted Ordinance 20440 ("Ordinance"), which purported to legislatively extend the effective dates for all Type II and III land use application approvals in effect in the City, including Phase V of the PUD. In all, the Phase V PUD construction schedule has been extended a total of 14 years.

On July 31, 2013, Willamette Oaks requested another extension of the Phase V PUD construction time schedule. On December 20, 2013, the Director approved Willamette Oaks' request. A copy of the Director's decision is set forth in Exhibit A, attached hereto and incorporated herein by reference. On December 24, 2013, the City mailed the Director's decision. This appeal followed.

4. The Appeal Satisfies the Requirements of EC 9.7605.

EC 9.7605 ("Filing of Appeal of Planning Director's Decision") explains the process and minimum requirements for filing an appeal of a decision by the Director. This section of the written statement explains how the appeal satisfies each subsection of EC 9.7605:

9.7605 Filing of Appeal of Planning Director's Decision.

- (1) Within 12 days of the date of the mailing of the planning director's decision, the decision may be appealed to the hearings official or historic review board according to the appeal review authority specified in Table 9.7055 Applications and Review Authorities by the following:**
 - (a) Applicant.**
 - (b) Owner of the subject property.**
 - (c) Neighborhood group officially recognized by the city that includes the area of the subject property.**
 - (d) Any person who submitted written comments in regards to the original application.**
 - (e) A person entitled to notice of the original application.**
 - (f) A person adversely affected or aggrieved by the initial decision.**

RESPONSE: The Director mailed the decision on December 24, 2013 (*see* Exhibit B, which is a copy of the Notice of Decision, dated December 24, 2013 and setting forth an appeal deadline of January 6, 2014). Goodpasture filed this appeal with the City prior to the 5:00 p.m., January 6, 2014 deadline. Therefore, the filing date is within 12 days after the mailing of the Director's decision, and the appeal is timely. Goodpasture submitted written comments in regard to the application, is a person entitled to notice of the Director's decision, and is a person adversely affected by the Director's decision. For these reasons, Goodpasture has standing to appeal the Director's decision.

- (2) The appeal shall be submitted on a form approved by the city manager, be accompanied by a fee established pursuant to EC Chapter 2, and be**

received by the city no later than 5:00 p.m. of the 12th day after the notice of decision is mailed. The record from the planning director's proceeding shall be forwarded to the appeal review authority. New evidence pertaining to appeal issues shall be accepted.

RESPONSE: This appeal includes a completed, signed "Appeal of Planning Director's Decision" form and a check for the \$250.00 appeal fee. The City will receive the appeal for filing by 5:00 pm on January 6, 2014, the day that is 12 days after the City's December 24, 2013 mailing of the notice of the Director's decision. Goodpasture understands that the record from the Director's proceeding will be forwarded to the Hearings Official. Goodpasture reserves the right to present new evidence pertaining to appeal issues to the Hearings Official.

- (3) **The appeal shall include a statement of issues on appeal and be limited to the issues raised in the appeal. The appeal statement shall explain specifically how the planning director's decision is inconsistent with applicable criteria.**

RESPONSE: On appeal, Goodpasture raises the seven (7) issues identified below. This section of the written statement explains specifically how the Director erred and why the Director's decision is inconsistent with applicable criteria. Goodpasture further reserves the right to submit additional argument and evidence at the *de novo* hearing in this matter.

A. The Director erred in concluding that the criteria in EC 9.516(9) (1971), which expressly regulates modifications to the PUD Agreement, do not constitute the applicable approval criteria governing Willamette Oaks' application.

The Director erroneously construes current code criteria under EC 9.8370 (related to modifications to an approved PUD) as the applicable approval criteria for this application, which requests modification to the Phase V construction time schedule. However, the Phase V PUD construction schedule was set forth as part of the Phase V PUD Agreement, not the Phase V PUD itself. The Director misconstrues EC 9.8370 as the future "corresponding provision" of EC 9.516(9) (1971) (relating to modifications of PUD agreements) and, therefore, erroneously applies EC 9.8370 as the approval criteria applicable to the present application.

As a condition of approval for the final Phase V PUD, the City imposed Condition No. 1(d), which required, in part, "The final executed PUD agreement shall further specify the time schedule by which all construction shall be completed." (PD 86-1, Phase V MD 89-18). In compliance with such condition, the PUD developer and the City entered into the Phase V PUD Agreement, which set forth a construction time schedule. The Phase V PUD Agreement also provided that "[a]ny additions, deletions, or modifications to this Agreement, including the exhibits, are subject to provisions of Section 9.516(9) of the Eugene Code, 1971 (or the corresponding provision of any such future law)."

EC 9.516(9) (1971) expressly regulates modification of a PUD agreement. On the other hand, EC 9.8370 regulates modifications to an approved PUD, itself. There is no corresponding provision in the present code addressing the modification of a PUD agreement. By specifying EC 9.516(9) (1971) as the criteria applicable to modifications of the PUD Agreement, the parties

explicitly negotiated and adopted such code provisions to regulate any future modification to the PUD Agreement. Since there is no current code provision regulating modifications to a PUD agreement, the provisions of EC 9.516(9) (1971) apply to this application. The Director erred in concluding otherwise. For these reasons, and for those set forth in the letter from Michael Robinson to Steve Ochs in the proceeding below, dated December 6, 2013, the Hearings Officer should reverse the Director's decision and deny Willamette Oaks' application.

B. The Director's decision is not supported by substantial evidence in the whole record or adequate findings to support the conclusion that the PUD modification satisfies EC 9.516(9)(e)(1) (1971).

As explained above, EC 9.516(9)(e)(1) is applicable to the extension request. In accordance with EC 9.516(9)(e)(1) (1971), an extension of construction time schedule is identified as a minor modification which may be approved by the Planning Director upon a finding that the changes:

- “a. Are consistent with the conditions of the original approval, and
- b. Result in insignificant changes in the outward appearance of the development and impact on the surrounding properties, and
- c. Remain consistent with applicable permit criteria.”

The Director has failed to make findings demonstrating that the application has met all applicable approval criteria, including that the Phase V PUD “will remain consistent with applicable permit criteria,” as required. Additionally, there is no substantial evidence in the whole record to support such findings. For these reasons, and for those set forth in the letter from Michael Robinson to Steve Ochs in the proceeding below, dated December 6, 2013, the Hearings Officer should reverse the Director's decision and deny Willamette Oaks' application.

C. The Director erred by failing to acknowledge, analyze, and provide findings demonstrating compliance with the criteria for extension of the construction schedule pursuant to the Phase V PUD Agreement.

The Director erroneously construes EC 9.7320(5) as providing the applicant the ability to extend the PUD construction time schedule, regardless of any restrictions on extensions of time contained in an executed PUD agreement. As previously stated, the Phase V PUD construction schedule was set forth as part of the Phase V PUD Agreement, not the Phase V PUD itself. Accordingly, any modification to such construction schedule must meet the applicable approval criteria contained in the PUD Agreement, as well as all applicable approval criteria contained in the Eugene Code.

EC 9.7320(5) governs expiration of final PUD approvals and modifications to a PUD approval, and provides the ability to request a change to the commencement or expiration of such approvals. However, EC 9.7320(5) does not expressly regulate or otherwise authorize extensions to PUD construction time schedules.

The original Phase V PUD Agreement provided a time schedule for construction and criteria for extending such time schedule:

“1. DEVELOPMENT STANDARDS

a. Time Schedule: Time being of the essence, the construction will commence by April 15, 1999, and total construction, including landscaping, shall be completed on or before September 17, 2001. These dates shall be part of the development schedule within the meaning of Sections 9.510 of the Eugene Code, 1971 (or the corresponding provision of any future such law). Notwithstanding the foregoing development schedule, the time for completion shall be extended by the period of time commencement or completion of construction is delayed on account of any suit, action or other proceeding challenging the granting of project approval or the right project, or on account of any strike, lockout, civil commotion, military activity, sabotage, or inability to obtain materials, labor, or service, natural disaster or casualty, or any other cause reasonably beyond the power of the Developer to control or lessen the effect thereof upon commencement or completion.”

Most recently, the Phase V PUD Agreement was modified by MDA 07-1, which removed the ability to extend the time schedule. Specifically, MDA 07-1 provides, in relevant part:

“In accordance with the approved modification, the time schedule included in the original agreement (Development Standards, Section 1.a) is revised as follows:

Time Schedule: Time being of the essence, the commencement of construction for Phase V shall occur by August 1, 2010, with the completion of Phase V construction by August 1, 2011.”

Since the Phase V PUD Agreement was modified such that no further time extensions are authorized, the application should have been denied, and the Director’s decision should be reversed. Alternatively, even if time extensions are determined to still be available, the Director failed to make findings supported by substantial evidence demonstrating that Willamette Oaks qualified for a time extension under the applicable criteria for extensions set forth in the PUD Agreement. For these reasons, and those set forth in the letter from Michael Robinson to Steve Ochs in the proceeding below, dated December 6, 2013, the Hearings Officer should reverse the Director’s decision and deny Willamette Oaks’ application.

D. The Director erred by finding that the restrictions on time extensions under EC 9.7020 were inapplicable and conflicted with EC 9.7320.

The Director misconstrued EC 9.7020 as applying only during “an ongoing initial application process,” and erroneously found that this code provision was not implicated in the present

application. The Director also misconstrued the restrictions on time extensions under EC 9.7020 as conflicting with the provisions of EC 9.7320, related to expiration of land use approvals.

While the Director suggests that EC 9.7020 only applies in the context of an ongoing initial application process where an applicant seeks to extend the “120-day rule,” the plain and clear language of such code provision and its context belies the Director’s reading. EC 9.7020 provides as follows:

“Extension of Time Limit Restrictions. Upon the written request of the applicant submitted to the planning director, any applicable time limits may be extended for a specified period of time, but in no case may the total of all extensions exceed 245 days.”
(Emphasis in original).

The above restriction on extensions of time limits applies to the present application. Pursuant to EC 9.7000, “[r]eview of an application to . . . develop or use property . . . shall be processed as provided in sections 9.7000 through 9.7885.”

The present application is an application to extend the construction schedule in order to develop the Phase V PUD. Accordingly, it is subject to the restriction on extensions of time limits. As previously mentioned, the Phase V PUD originally received final approval in 1997. It has already received construction schedule time limit extensions, at the request of Willamette Oaks, for a total of 11 years, plus an additional automatic 3-year extension. Since the total of all extensions to date has far exceeded 245 days, this current request for an extension of time should have been denied.

Moreover, the applicability of EC 9.7020 to the present application does not conflict with EC 9.7320. As previously mentioned, EC 9.7320(5) governs expiration of final PUD approvals and modifications to a PUD approval, and provides the ability to request a change to the commencement or expiration of such approvals. However, EC 9.7320(5) does not expressly regulate or otherwise authorize extensions to PUD construction time schedules, especially where such construction time schedules were set forth in a PUD agreement, and not in the final PUD itself.

Since the present application was barred by the provisions of EC 9.7020, and since EC 9.7320 is irrelevant to this application, the Hearings Officer should reverse the Director’s decision and deny Willamette Oaks’ application.

E. The Director erred in concluding that the modification is consistent with the original conditions of approval as required by EC 9.8370(1) and EC 9.516(9)(e)(1)(a) because the Director: (1) misconstrued the plain language of Condition 1(d); and (2) imposed a new condition that modifies Condition 1(d).

1. Condition 1(d).

Pursuant to EC 9.8370(1) and EC 9.516(9)(e)(1)(a), a PUD or PUD agreement modification proposal must be consistent with the conditions of the original approval. The Final PUD

approval for Phase V includes Condition 1(d), which required Willamette Oaks to identify a time schedule for completing Phase V and then memorialize that in the companion development agreement:

“A specific time schedule indicating the number of phases, construction to be completed during each phase, and time period of each phase, must be submitted by the applicant. Absent an approved schedule as specified, and as per Eugene Code 9.510(4), the applicant shall be required to obtain all approvals for necessary building permits within one year of the decision date of this final approval of Phase V development. The final executed PUD agreement shall further specify the time schedule by which all construction shall be completed.”

In the decision in this case, the Director made two important interpretations regarding this condition, both of which are erroneous.

2. The Director misconstrued Condition 1(d) by concluding that the condition does not restrict changes to the construction schedule.

First, the Director concluded that Condition 1(d) does not restrict extensions to the commencement and completion dates. However, the Director’s interpretation misconstrues the language of this condition. In fact, the plain language of Condition 1(d) dictates that Willamette Oaks is required to identify a construction schedule and then abide by it. For example, the condition requires Willamette Oaks to submit a “specific time schedule.” Further, this schedule is mandatory because it determines when “all construction shall be completed” (emphasis added). Finally, the condition does not grant the City any discretion to grant extensions to that mandatory schedule. As such, any extension is necessarily inconsistent with the plain language of the condition.

If the condition operates as the Director apparently understands it to operate, there could never be a proposed modification of the construction schedule that was inconsistent with the condition because any such inconsistency could simply be eliminated by modifying the agreement referenced in the condition. Such a reading renders meaningless the requirement in the condition that Willamette Oaks establish a “specific time schedule” and that the schedule determine when “all construction shall be completed.” Further, it is irrelevant that the City has interpreted this condition to allow for extensions in the past, because, as explained above, that interpretation is erroneous, and the City is not obligated to apply erroneous interpretations of local provisions in subsequent application proceedings. *See McInnis v. City of Portland*, 25 Or LUBA 376, 379, *aff’d without opinion*, 123 Or App 123 (1993) (so holding).

Further, although Willamette Oaks will likely contend that EC 9.7230(5) allows an applicant to request a change to the commencement or expiration time period through the PUD modification process, EC 9.7230(5) does not supersede the conditions of an individual approval. Where, as here, such conditions do not contemplate a change to the commencement or expiration time periods, and therefore, a modification is not “consistent with the conditions of original approval,” the change to the commencement or expiration time period must be denied.

3. The Director erred in imposing a new condition that modifies Condition 1(d).

Second, the Director determined that, subject to imposing a new condition allowing an amendment to the PUD agreement and the construction schedule, Willamette Oaks' modification request would be consistent with Condition 1(d). The problem with the Director's action is that the new condition is not consistent with Condition 1(d) because the new condition permits an amendment to the PUD agreement and construction schedule when, as explained above, Condition 1(d) does not allow for such amendments.¹ In short, the new decision modifies the original condition.

Importantly, the Land Use Board of Appeals ("LUBA") has specifically rejected the City's attempts to apply its PUD modification criteria in this manner. *Willamette Oaks LLC v. City of Eugene*, 64 Or LUBA 24 (2011). In *Willamette Oaks*, LUBA concluded that EC 9.8335(1)—the parallel provision applicable to Tentative PUD modifications—does not permit the Director to approve modified versions of the original conditions of approval in the course of approving a PUD modification request:

“There is simply nothing in EC 9.8335(1) that purports to give the planning director or the hearings officer the authority to overlook inconsistency with any ‘conditions of the *original* approval,’ or to modify those original conditions of approval in evaluating the modification proposal for consistency with the conditions of the original Tentative PUD approval under EC 9.8335(1).”

Willamette Oaks, 64 Or LUBA at 29 (Italics in original.). Although Willamette Oaks or the Director may contend that the present case is distinguishable because here, the Director is imposing a new condition, not expressly modifying the original condition, this is a distinction without a difference in this case. In fact, the purpose and effect of the Director's new condition is to modify the terms of the original condition by allowing for an amendment that is not otherwise authorized.

In short, if the only way the Director can find that the modification is consistent with the original conditions of approval is by imposing a new condition that effectively modifies the original condition, the modification does not satisfy the requirements of EC 9.8370(1) or EC 9.516(9)(e)(1)(a). Therefore, the Hearings Official should reverse the Director's decision, uphold the appeal, and deny the modification request.

F. The Director erred in concluding that the application satisfies EC 9.8370(2) and EC 9.516(9)(e)(1)(b) when the only evidence in the record refutes this conclusion.

Pursuant to EC 9.8370(2) and EC 9.516(9)(e)(1)(b), a PUD or PUD agreement modification proposal must result in insignificant changes in the physical appearance of the development, the use of the site, and impacts on surrounding properties. The Director found compliance with such criterion by stating that no site plans were filed as part of the modification application and, therefore, erroneously concluded that the proposed modification will not cause significant

¹ Notably, the Director's action to impose a condition expressly allowing for an amendment effectively admits the validity of Goodpasture's argument that Condition 1(d) does not currently provide for such amendments.

changes to the development or impacts on surrounding properties. The Director also erroneously concluded that consistency with the condition of original approval requiring a 20-foot fire access lane and consistency with EC 9.0060 requiring compliance with current development standards were inapplicable because no site plans were filed with the application.

Goodpasture submitted evidence into the record consisting of Willamette Oaks' most recent site plans filed with the City, which detail significant changes to the physical appearance of the development and impacts on surrounding properties. These significant changes include a reduced fire access lane, inadequate bicycle parking, unauthorized changes to the design team, and inadequate vehicle parking. *See* letter from Michael Robinson to Steve Ochs, dated December 6, 2013. While no site plans were filed as part of the modification application, substantial evidence in the record (indeed, the only evidence in the record) demonstrates that the modification proposal is 1) inconsistent with the site plans approved by the Phase V PUD approval, 2) inconsistent with the condition of original approval requiring a 20-foot fire access lane, and 3) inconsistent with current development standards. Because the inconsistencies either conflict with the original approved Phase V PUD plans, are significant changes in the physical appearance of the development, or otherwise fail to comply with other approval criteria, these deviations may not be approved through this extension request as a modification to an approved PUD. This modification proposal fails to comply with the above-referenced criteria, and the Director erred in approving this application. *Frankland v. City of Lake Oswego*, 267 Or 452 (1973) (the flexibility inherent in a PUD requires that the development that is actually built strictly comply with the site plans and conditions of approval that were imposed during the discretionary land use proceeding).

Alternatively, we understand the Director acknowledges some merit to this argument. His decision states, "While the argument might have some merit with respect to building permits that would subsequently carry out the approved PUD site plans, this decision relates only to the applicant's request for timeline extension." In light of such acknowledgment, and in order to ensure compliance with the above-referenced criterion, if the Hearings Official upholds the Director's decision, Goodpasture requests a condition of approval emphasizing the requirement that all development plans submitted at the building permit stage must be consistent with those plans that were approved by the Phase V PUD approval.

G. The Director erred in approving the modification request because the 16-year old Phase V of the Willamette Oaks PUD is stale due to significant changes in applicable facts and law. Further, Willamette Oaks has abandoned and discontinued any vested right it had to complete and continue what is now a nonconforming development.

The City approved the Tentative PUD for Phase V in 1990 and the Final PUD for Phase V in 1997. More than sixteen years have passed, and Willamette Oaks has not completed any improvements in Phase V. In fact, Willamette Oaks has not even applied for a single building permit for Phase V during that time. In the meantime, applicable factual and legal circumstances have changed dramatically.

First, in terms of applicable law, there have been amendments and changes to applicable building codes and the location of the nearby Willamette River floodplain (as determined by applicable state and federal agencies). Phase V of the PUD is not vested to develop under the building code and floodplain standards in effect in 1990 or 1997. Rather, the new building code and floodplain standards apply to development of Phase V. Yet, there is no evidence that Phase V of the PUD as originally approved could comply with these various standards, many of which are designed to protect life and safety. Accordingly, continuing to extend Phase V may be a pointless exercise because it may never be able to be built as originally approved.

Further, the applicable land development regulations have also changed, as the City has adopted a new land development code in the interim. As such, Phase V is a nonconforming development. Any vested right Willamette Oaks had to complete and continue Phase V has been lost through discontinuance based upon Willamette Oaks' failure to make any effort to construct Phase V since 1997. *See Hood River Citizens for a Local Economy v. City of Hood River*, ___ Or LUBA ___ (LUBA No. 2012-003, June 21, 2012) (recognizing the potential for abandonment and discontinuance of a common law vested right).

Second, surrounding development patterns have changed dramatically as well. For example, on adjacent property, Goodpasture is in the process of constructing over 500 units of multi-family apartments, an assisted living facility, and related improvements. Therefore, if Phase V is constructed now, it will be in a dramatically different context than when it was first approved.

Given that nearly a generation of time has passed since the original approval, there have been significant changes in factual and legal circumstances in the meantime, and Willamette Oaks has abandoned and discontinued its development, a new Tentative PUD application is warranted for Phase V. The Hearings Official should deny Willamette Oaks' extension request.

5. Conclusion.

For the reasons contained herein and in the letter from Michael Robinson to Steve Ochs, dated December 6, 2013, which is hereby incorporated by reference, the Hearings Official should reverse the Director and deny Willamette Oaks' application to extend the Phase V PUD construction time schedule.



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FINDINGS AND DECISION OF THE PLANNING DIRECTOR:

MODIFICATION OF TIME SCHEDULE FOR WILLAMETTE OAKS PUD, PHASE V (MDA 13-2)

Application Summary:

Final PUD modification to extend the approved time schedule.

Applicant's Representative:

James W. Spickerman, Gleaves Swearingen LLP

Lead City Staff:

Steve Ochs, Associate Planner, Eugene Planning Division, (541) 682-5453

Subject Property/Zoning/Location:

Tax Lots 1701 and 1702 of Assessor's Map 17-04-24-10; Zoned R-2/PD/WR Medium Density Residential with the Planned Unit Development and Water Resource overlays; Located at 445 Alexander Loop east of Goodpasture Island Road

Relevant Dates:

Application originally submitted on July 31, 2013 deemed complete November 12, 2013; decision granting approval issued on December 20, 2013.

Background/Present Request:

This application concerns a timeline extension for Willamette Oaks (Retirement Center) PUD, Phase V, which is part of a larger planned unit development that was approved by the Eugene Hearings Official in 1986, for 225 retirement units designed for independent living (see PD 86-1 and WG 86-1). The approval included a phasing plan that was subsequently modified into 4 phases of development and resulted in 172 units being constructed to date. The current Phase V approval is the result of a Major Modification application (MD 89-18) approved in 1990 by the Hearings Official. Currently, the subject property is developed with one main building designed with three wings and parking areas that take access from Alexander Loop. Phase V includes an additional 80-unit assisted living facility and 23 parking spaces to be developed south of the existing retirement center.

On February 14, 1995, the Eugene Hearings Official extended the tentative plan approval for Phase V until August 8, 1997. On July 29, 1997, the applicant submitted for final PUD approval and it was approved by the Eugene Planning Director. A PUD performance agreement was then executed by the applicant and the City in December of 1997. Exhibit B of the PUD agreement contains the approved site plans.

The agreement included a time schedule stipulating that construction of the project would begin by April 15, 1999 and that total construction including landscaping shall be completed by September 17, 2001. On March 15, 1999, the Planning Division granted an extension to the commencement date to be April 15, 2000. The time schedule for construction of Phase V was then subsequently extended by several additional modifications (see MDA 00-6, MDA 00-15, MDA 03-11, and MDA 07-1), each of which were approved by the City. Ordinance No. 20440 further extended those dates to August 1, 2013 and August 1, 2014 respectively. The applicant is now requesting to extend the commencement date for Phase V to June 9, 2014 with completion of construction by June 9, 2015.

As discussed in greater detail below, the applicant's proposed modification does not include any changes to the design of the proposed development, as shown on the approved Final PUD plans. As proposed, the applicant's request will only affect the time schedule for construction. Additional details of the proposal are included in the application materials, all of which are included as part of the public record and located in the application file for reference.

The application is subject to the Type II land use application process. The relevant Type II land use application procedures are primarily addressed in EC 9.7200 through EC 9.7230. Relevant approval criteria are addressed at EC 9.8370. The following evaluation includes findings of compliance with the applicable criteria related to the modification with conditions of approval and other requirements or informational items noted where appropriate.

Referrals/Public Notice

After being deemed complete, public notice of this PUD modification was mailed on November 22, 2013, in accordance with procedural requirements of the Eugene Code (EC). A letter from Michael Robinson was submitted opposing the request to extend the time schedule, asserting that the modification does not comply with code provisions and fails to meet conditions of approval. The opposing testimony from Mr. Robinson addresses a number of issues that are not relevant or actionable within the scope of the approval criteria for the PUD modification. As such, his arguments are briefly summarized and largely addressed here as preliminary issues, rather than in the context of the approval criteria below.

Approval Criteria: Mr. Robinson asserts that the modification is subject to old code provisions at EC 9.516(9), in effect at the time of the original approval, which included a requirement that the proposal "will remain consistent with the applicable permit criteria." The Planning Director disagrees. In accordance with State law and Eugene Code requirements, the application is subject to the approval criteria and procedures currently in effect. These include the Type II application procedures and the approval criteria for PUD modifications at EC 9.8370, which are addressed in the following decision. More explanation follows.

As noted above, the performance agreement for Willamette Oaks PUD includes a provision that sets the time schedule for commencement and completion of construction. Paragraph 1.a. of the original Phase V agreement required that construction commence by April 15, 1999, and that total construction be completed on or before September 17, 2001. These dates were extended by several subsequent modifications to the time schedule that were all approved by the City. Ordinance No. 20440 further extended those dates to August 1, 2013 and August 1, 2014, respectively. The applicant now seeks another extension to those timelines. To do so, it must modify the performance

agreement. Provision 2 of the development agreement includes an important clarification worth noting here, as follows: "Any additions, deletions, or modifications of this Agreement, including the exhibits, are subject to provisions of Section 9.516(9) of the Eugene Code, 1971 (*or the corresponding provision of any such future law*)."
Underline and *italics* added for emphasis.

The old code provisions in EC 9.516(9) do not apply here as asserted in Mr. Robinson's testimony. Provision 2 of the agreement provides that the modification be analyzed under EC 9.8370, which is the corresponding future law of the old EC Section 9.516(9). Under EC 9.8370, the applicant need not demonstrate that the modification "will remain consistent with the applicable permit criteria," because that requirement was eliminated as a result of the City's Land Use Code Update through code amendments occurring in 2001. Therefore, the application is properly analyzed below with respect to the current code criteria.

Mr. Robinson also asserts that a prior modification (MDA 07-1) removed the ability to further extend the time schedule. Again, the Planning Director disagrees. Current code at EC 9.7230(5) authorizes the request for time extension, which is formalized upon approval through the related performance agreement. The agreement signed as part of a past approval does not supersede the ability to extend a time period under this code section.

Code restriction on time extensions (EC 9.7020): Mr. Robinson's letter also asserts that EC 9.7020 limits time extensions to a total of 245 days, which has already been exceeded. This section is found in the general application procedures of the code. EC 9.7230 more specifically addresses Final PUD approval and allows the expiration period to be extended with no codified limit on the number of modifications or length of time requested. Under EC 9.7020, an applicant could request an extension for up to 245 days in conjunction with the normally mandated "120-day rule" under state statutes, typically utilized in the context of an ongoing initial application process so as not to exceed a total of 365 days. Here, the applicant has made no such request under EC 9.7020, and the request in no way implicates EC 9.7020. To the extent that it might be (incorrectly) read as being applicable as the letter asserts, such a reading conflicts with the directly applicable and specific meaning of EC 9.7320, and therefore cannot serve to eliminate that allowance for a timeline extension as requested here under the provisions for PUD modification.

Failure to comply with current standards – Testimony asserts that the modification must comply with current development standards applicable at the time of application under EC 9.0060. This would only be true if the modification required application of development standards to a new or "modified" proposal. That is not the case in the instance, as the request does not change the already approved site plans. Site plans were submitted by Mr. Robinson, but these are not part of the applicant's request for modification. Here, the testimony misreads the applicability of EC 9.0060. While the argument might have some merit with respect to building permits that would subsequently carry out the approved PUD site plans, this decision relates only to the applicant's request for timeline extension.

PUD Modification Evaluation:

The following findings demonstrate that the proposed PUD modification will comply with all applicable approval criteria as set forth in EC 9.8370. The approval criteria and related standards are listed below in **bold**, with findings addressing each. Conditions of approval and informational items

are included where appropriate.

EC 9.8370(1): The proposed modification is consistent with the conditions of original approval.

Regarding the conditions of the original approval, on February 8, 1990, the Hearings Official granted approval to a Major PUD Modification for Phase V of Willamette Oaks PUD (MD 89-18) to construct the subject 80-unit facility in phases. The approval included the following statement:

Approval is granted for a five-year time frame from completion of the first phase of this development for the beginning of construction of subsequent phases.

Within 5 years of the major modification approval, the applicant requested an extension to the decision and the Hearings Official granted the extension to August 8, 1997 by which time the applicant must submit a final PUD plan application for Phase V. On July 29, 1997, the applicant submitted the final PUD plan which was approved by the Eugene Planning Director. The Findings and Decision of the Eugene Planning Director stated as a condition of approval, #1(d):

A specific time schedule indicating number of phases, construction to be completed during each phase, and time period of each phase, must be submitted by the applicant. Absent an approved schedule as specified, and as per Eugene Code 9.510(4), the applicant shall be required to obtain all approvals for necessary building permits within one year of the decision date of this final approval of Phase V development. The final executed PUD agreement shall further specify the time schedule by which all construction shall be completed.

As noted by the applicant, the above condition of approval was met when the applicant signed the PUD agreement. The original agreement specified that commencement of Phase V would occur by April 15, 1999 and would be completed by September 17, 2001. Subsequently, additional requests for extensions to the time line for development have been approved by the Planning Director, the Eugene Hearings Official or City Council as described above. The original conditions of approval did not restrict extensions to the commencement or completion dates. Thus, approval of the extensions does not affect the original conditions of approval.

Opposing testimony argues that site plans filed by the applicant are inconsistent with conditions of approval of the PUD. No site plans have been filed as part of this modification, and no request to otherwise modify the approved site plans has been requested by the applicant.

Staff notes that the date for completion of construction also includes the completion of landscaping as specified in the PUD agreement. As noted in the final PUD approval condition cited above, the applicant shall sign an agreement that specifies the time frame for construction. To ensure consistency with this condition the following condition of approval is warranted:

An amendment to the original PUD agreement, specifying the requested commencement and completion dates for construction, shall be signed by the applicant and the City.

Thus, the modification will meet this criterion with the condition for an amendment to the original PUD agreement specifying modified time schedule.

EC 9.8370(2): The proposed modification will result in insignificant changes in the physical appearance of the development, the use of the site, and impacts on surrounding properties.

The proposed modification does not involve any significant changes to the physical appearance of the development, use of the site, or impact on surrounding properties. The proposed modification will only extend the time schedule for commencement and completion of construction, as established within the executed performance agreement for the original approval.

Opposing testimony argues that site plans filed by the applicant are inconsistent with conditions of approval of the PUD. No site plans have been filed as part of this modification, and no request to otherwise modify the approved site plans has been requested by the applicant as part of this application.

Accordingly, no further analysis or additional findings of compliance with the applicable criteria are necessary, and the applicant's requested modification is found to comply with the applicable approval criteria as listed above.

Decision:

Based on the above findings, the information and materials submitted or otherwise available to date, and the approval criteria as contained in EC 9.8370, approval of the applicant's request for Final PUD modification is hereby granted. As conditioned below, the commencement of Phase V will be extended to June 9, 2014 and completion of Phase V will be extended to June 9, 2015

Conditions of PUD Modification Approval:

1. An amendment to the original PUD agreement, specifying the requested commencement and completion dates for construction, shall be signed by the applicant and the City.

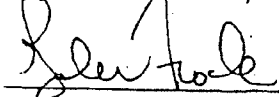
For information on the condition above, contact Steve Ochs, Planning Division, at 682-5453.

Post-Approval:

Pursuant to EC 9.7220(3), the Planning Director's decision regarding this Type II application is effective on the 13th day after notice of this decision is mailed, unless appealed according to the procedures in EC 9.7605. Once the decision becomes effective, pursuant to EC 9.7230, the Planning Director's approval shall remain effective for 36 months.

It is also noted that this approval does not relieve the applicant of complying with other applicable provisions of the Eugene Code or Oregon Revised Statutes which may govern the development of this property.

Approval Granted By:

 12/20/13

Gabe Flock, Senior Planner,
for the Eugene Planning Director



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December 6, 2013

VIA EMAIL

Mr. Steve Ochs
City of Eugene
Planning and Development Planning
99 West 10th Avenue
Eugene, OR 97401

**Re: Willamette Oaks Phase V (MDA 13-2)
Opposition to Request for PUD Modification Extending Construction Schedule**

Dear Mr. Ochs:

This office represents Goodpasture Partners, LLC ("Goodpasture"). We have received notice of Willamette Oaks LLC's ("Willamette Oaks") application requesting modification of the Willamette Oaks Phase V Planned Unit Development ("Phase V PUD"). Willamette Oaks' application requests an additional 10-month extension of the 16-year old Phase V PUD construction schedule (the "Application").

This letter provides comments in opposition to the Application and demonstrates that the Application fails to meet the applicable approval criteria for modifications to approved PUDs. In summary, and as discussed in more detail below, the Application should be denied because:

- The approved Phase V PUD is stale, outdated, and out of compliance with current development standards. The original tentative PUD approval was granted 27 years ago, and the final Phase V PUD approval was granted 16 years ago. The express terms of the "Time Schedule" provided in the Phase V PUD Agreement, defined below, specifically stated, "Time being of the essence" Clearly, Phase V was expected to be constructed in a timely manner and, after 16 years, has remained unbuilt;
- The Application violates Eugene Code ("EC") 9.7020, which restricts the total amount of time extensions to 245 days;

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- The Application violates EC 9.0060, which requires compliance with current development standards applicable to a specific proposed use as part of a land use application. The approval of a time extension to construct the Phase V PUD is tantamount to re-approving the PUD itself; therefore, compliance with current PUD standards is required;
- The Application fails to meet Condition 1.c of the original Phase V PUD, which required 20-foot fire access lanes;
- The Application fails to meet the implicit condition of the original approval that all development plans must comply with the plans that were approved as part of the final Phase V PUD approval;
- The Application results in significant changes in the appearance of the development and impact on surrounding properties; and
- The Phase V PUD Agreement has been modified such that no further construction schedule extensions are authorized, and the applicant does not qualify for any such construction schedule extensions.

Because the Application fails to meet all applicable approval criteria, and for the reasons discussed more fully below, the Director must deny the Application.

A. History of Phase V PUD Approvals and Agreements.

Willamette Oaks received Tentative PUD approval for a two-phased project in 1986 (PD 86-1), 27 years ago. Phase II was divided into subphases II, III and IV in 1987 through a Final PUD approval. Phase V was added to the PUD in 1990 through a Major Modification to the PUD approved by the hearings officer (MD 89-18). Final PUD approval for Phase V was approved by the hearings officer with conditions on September 4, 1997. As part of the approval, Curtis Reeve and the City of Eugene entered into a "Planned Unit Development Agreement" in November 1997 ("Phase V PUD Agreement"). The Phase V PUD Agreement established a construction schedule providing as follows:

"Time being of the essence, the construction will commence by April 15, 1999, and total construction, including landscaping, shall be completed on or before September 17, 2001." (Emphasis added),

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In the 16 years since the final PUD approval, the Phase V PUD has received a number of extensions, with the most recent extension (MDA 07-1) requiring that construction commence by August 1, 2010 and be completed no later than August 1, 2011. Collectively, the aforementioned approvals are referred to as the "Approved PUD." In all, the Approved PUD construction schedule has been extended at the request of Willamette Oaks a total of 11 years.

B. Approval Criteria for Modifications to Approved PUDs.

As discussed in more detail below, the Application is subject to two sets of approval criteria: 1) the criteria for modification to an approved PUD pursuant to the Eugene Code, and 2) the criteria for extension of the construction schedule pursuant to the Phase V PUD Agreement. In order to approve the Application, the Director must find that both sets of criteria are met.

1. Eugene Code Approval Criteria.

The current Eugene Code contains approval criteria for modifications to an approved PUD. EC 9.8370.¹ However, the Application seeks modification to the Phase V PUD construction schedule, which schedule was set forth as part of the Phase V PUD Agreement, not the Phase V PUD itself. Therefore, the terms of the Phase V PUD Agreement control the process and criteria required for any modification to such agreement.

As noted by the applicant, the Phase V PUD Agreement provides that "[a]ny additions, deletions, or modifications to this Agreement, including the exhibits, are subject to provisions of Section 9.516(9) of the Eugene Code, 1971 (or the corresponding provision of any such future law)." We agree with Willamette Oaks that there is no corresponding provision in the present code addressing the modification of a PUD agreement. As previously noted, the current Eugene Code only addresses modifications to an approved PUD itself. Therefore, the provisions of Section 9.516(9) as they appeared in the 1971 Eugene Code apply to this application.

In accordance with Eugene Code 9.516(9)(e)(1) (1971), an extension of construction time schedule is identified as a minor modification which may be approved by the Planning Director upon a finding that the changes:

¹ The criteria are as follows: 1) the proposed modification is consistent with the conditions of the original approval, and 2) the proposed modification will result in insignificant changes in the physical appearance of the development, the use of the site, and impact on the surrounding properties. EC 9.8370. As explained below, if EC 9.8370 was applicable, the Application fails to meet those criteria.

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- “a. Are consistent with the conditions of the original approval, and
- b. Result in insignificant changes in the outward appearance of the development and impact on the surrounding properties, and
- c. Remain consistent with applicable permit criteria.”

Notably, the Planning Director “may” approve, but is not required to approve, a minor modification that meets the above criteria.

As discussed in more detail below, the Application fails to meet the approval criteria in EC 9.516(9)(e)(1) (1971). Alternatively, even if the current code applies, the Application fails to meet current approval criteria and must be denied.

2. Phase V PUD Agreement Approval Criteria.

In addition, the Phase V PUD Agreement provided that the time for completion of construction could be extended if construction is delayed “on account of any suit, action, or other proceeding challenging the granting of project approval or the right project . . . or any other cause reasonably beyond the power of the Developer to control or lessen the effect thereof upon commencement or completion.”

The original Phase V PUD Agreement provided a time schedule for construction and criteria for extending such time schedule:

“1. DEVELOPMENT STANDARDS

- a. Time Schedule: Time being of the essence, the construction will commence by April 15, 1999, and total construction, including landscaping, shall be completed on or before September 17, 2001. These dates shall be part of the development schedule within the meaning of Sections 9.510 of the Eugene Code, 1971 (or the corresponding provision of any future such law). Notwithstanding the foregoing development schedule, the time for completion shall be extended by the period of time commencement or completion of construction is delayed on account of any suit, action or other proceeding challenging the granting of project approval or the right project, or on account of any strike, lockout, civil commotion, military activity, sabotage, or inability to obtain materials, labor, or

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service, natural disaster or casualty, or any other cause reasonably beyond the power of the Developer to control or lessen the effect thereof upon commencement or completion.”

Most recently, the Phase V PUD Agreement was modified by MDA 07-1, which removed the ability to extend the time schedule. Specifically, MDA 07-1 provides, in relevant part:

“In accordance with the approved modification, the time schedule included in the original agreement (Development Standards, Section 1.a) is revised as follows:

Time Schedule: Time being of the essence, the commencement of construction for Phase V shall occur by August 1, 2010, with the completion of Phase V construction by August 1, 2011.”

Since the Phase V PUD Agreement was modified such that no further time extensions are authorized, the Application must be denied. Alternatively, even if the Director determines that time extensions are still available, the Application fails to demonstrate that it qualifies for such time extension.

C. Bases for Denial by the Director.

For the reasons discussed in more detail below, the Application fails to meet the approval criteria for a minor modification under EC 9.516(9) (1971), and fails to meet the standard for allowing time extensions under the Phase V PUD Agreement.

1. EC 9.516(9)(e)(i)(c) (1971): “Remain consistent with applicable permit criteria.”

First and foremost, the extension application violates the minor modification criterion that requires that the change “[r]emain consistent with applicable permit criteria.” EC 9.516(9)(e)(i)(c) (1971). Under this approval criterion, since the present request is for a construction schedule extension, the Application must comply with the following: a) current criteria applicable to all permit applications, and b) current development standards applicable to the underlying Phase V PUD.

a. Restriction on extensions of time limits.

As an initial matter, this Application is not consistent with the Eugene Code’s restrictions on extensions of time limits. EC 9.7020 provides as follows:

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“Extension of Time Limit Restrictions. Upon the written request of the applicant submitted to the planning director, any applicable time limits may be extended for a specified period of time, but in no case may the total of all extensions exceed 245 days.”
 (Emphasis in original).

The above restriction on extensions of time limits applies to the present application. Pursuant to EC 9.7000, “[r]eview of an application to . . . develop or use property . . . shall be processed as provided in sections 9.7000 through 9.7885.”

The present Application is an application to extend the construction schedule in order to develop the Approved PUD. Accordingly, it is subject to the restriction on extensions of time limits. As previously mentioned, the Approved PUD originally received final approval in 1997. It has already received construction schedule time limit extensions, at the request of Willamette Oaks, for a total of 11 years, plus an additional automatic 3-year extension. Since the total of all extensions to date has far exceeded 245 days, this current request for an extension of time should be denied.

It is worth noting that the general policy behind restrictions on time limit extensions is to ensure that development in the City of Eugene complies with current land use standards and to limit nonconforming development. Eugene’s Code has been amended and updated at least six (6) times since 1971 to reflect the best practices of ensuring the safety and well-being of its citizens, and to further policy objectives such as natural resource protection. It is in the best interests of the City and its residents to make certain, to the extent possible, that all development complies with current code standards. 16 years have passed since the Approved PUD was first approved. In that time, many changes to the Eugene Code have occurred. Adding another 10 months to this ancient PUD approval would place this project further out of compliance with current code standards. Because the Application fails to comply with the Eugene Code’s restriction on time limit extensions, the Director should deny the Application.

b. Failure to comply with current development standards.

Additionally, the Application fails to demonstrate that the Phase V PUD complies with current development standards and criteria. EC 9.0060. The approval of a time extension to construct the Phase V PUD is tantamount to re-approving the PUD itself, which is why compliance with current PUD standards is required. *Gage v. City of Portland*, 24 Or LUBA 47 (1992) (because a PUD amendment application is a separate and distinct application from the original PUD application, the standards in effect when the PUD amendment application is filed apply, not the standards that were applicable to the original PUD application).

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Consistent with the policy of restricting time extensions to ensure that development complies with current land use standards, outdated PUDs (i.e., long-standing approved PUDs that have not yet been constructed) are not entitled to a construction schedule extension without demonstrating that the PUD meets current development standards. Such requirement is especially crucial in cases such as this, where the original PUD was approved 27 years ago, and Phase V of the PUD was approved 16 years ago. As part of the Application for a time extension, the applicant has the burden to show that the Phase V PUD complies with current development standards. The applicant has failed to do so, and the Director should deny the Application.

2. EC 9.516(9)(e)(i)(a) (1971): “Are consistent with the conditions of the original approval.”

The Application also violates the minor modification criterion which requires that the changes “[a]re consistent with the conditions of the original approval.” EC 9.516(9)(e)(i)(a) (1971).

a. Inconsistency with condition 1.c of the original Phase V PUD.

Condition 1.c of the original Phase V PUD required, “The applicant shall submit revised site plans incorporating fire access lanes which provide a minimum width of 20 feet, as required by the Fire Marshal.” The most recent site plan filed by the applicant shows that the fire lanes are reduced to twelve (12) feet. See Site Plan, Sheet C-3 attached as **Exhibit A**. Since the reduced width of the fire lanes of the Phase V PUD are inconsistent with the original conditions of approval, the Director should deny the current Application.

The applicant may argue that the recitals in the 1997 Phase V PUD Agreement explain that the subject condition was revised so that fire access lanes may be reduced to twelve (12) feet in width if the building includes a fire sprinkler system. However, although the City has broad authority to enter into PUD agreements, such agreements cannot be used to modify conditions of approved PUDs. The Eugene Code provides a specific process for modifications to approved PUDs. Specifically, modifications to approved PUDs are allowed only in limited situations, and the request must be processed as a Type II land use application. EC 9.8335 (modifications to tentative PUD approval) and EC 9.8370 (modifications to final PUD approval). Notably, a condition of approval of an approved PUD cannot be amended through the modification process; a new tentative PUD application that is processed as a Type III application is the only tool for amending a condition of approval. EC 9.8335 and EC 9.8370.

Since the applicant attempted to modify a condition of the original Phase V PUD through the 1997 Phase V PUD Agreement without following the proper procedures for a modification to a condition of approval, the original Condition 1.c requiring 20-foot fire access lanes remains valid and enforceable. The applicant’s most recent site plan does not contain 20-foot fire access lanes;

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therefore, it is inconsistent with conditions of the original approval and this Application must be denied.

b. Inconsistency with implicit condition to comply with approved plans.

Additionally, an implicit condition of the original approval is that all development plans must comply with those plans that were approved as part of the Approved PUD. Therefore, Phase V must strictly comply with the conditions of approvals and site plans that were approved by the Phase V PUD approval. *Frankland v. City of Lake Oswego*, 267 Or 452 (1973) (the flexibility inherent in a PUD requires that the development that is actually built strictly comply with the site plans and conditions of approval that were imposed during the discretionary land use proceeding) and *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002) (plans submitted as part of an application and relied upon by the city to find compliance with the code are binding and cannot be changed without city approval, even without express conditions to the effect). All of the performance/Planned Unit Development Agreements memorializing the Phase V land use approvals recognize the fundamental requirement that what is actually constructed must be in "strict compliance" with the Phase V PUD approval and related site plans.²

As detailed below, Goodpasture has reviewed the plans submitted by Willamette Oaks for Phase V construction and development, which are attached as **Exhibit B**, and finds that they are inconsistent with the Approved PUD, including the applications and site plans that were relied upon in granting the Phase V PUD approvals. Because the inconsistencies either conflict with the original approved Phase V PUD plans or are significant changes in the physical appearance of the development, these deviations may not be approved through this extension request as a modification to an approved PUD. This Application must be denied, and a new tentative PUD application is required. EC 9.8335 and EC 9.8370.

² Each of the agreements provides as Recital 2:

"2. Developer has requested approval of the City of phase five [of a PUD].... Approval by the City of such a request is discretionary. Approval is given in light of and because of the particular characteristics of the development, as evidenced by the plans as submitted. Development of the project, in strict compliance with plans, as submitted and approved, is necessary to protect the public health, safety and welfare...."

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3. EC 9.516(9)(e)(i)(b) (1971): "Result in insignificant changes in the outward appearance of the development and impact on the surrounding properties."

The Application also violates the minor modification criterion which requires that the changes "[r]esult in insignificant changes in the outward appearance of the development and impact on the surrounding properties." EC 9.516(9)(e)(i)(b) (1971). As detailed below, several elements of the plans submitted by Willamette Oaks for Phase V construction and development are inconsistent with the Approved PUD and do not comply with conditions of approval or significantly change the project. Accordingly, this Application must be denied, and no development permits for Phase V can be granted unless (1) the plans are revised so that they strictly comply with the Approved PUD; or (2) a new tentative PUD application is submitted.

1. Fire Access Lanes Must Be Twenty Feet Wide.

Condition 1.c of the final approval PUD required a fire lane minimum width of 20 feet. The Eugene Fire Marshall, pursuant to note 7 of the approved site plan, has purportedly reduced the width to 12 feet provided the buildings are "full protected by an improved automatic fire sprinkler system." The 1997 Phase V PUD Agreement includes a recital describing a narrowed fire lane. However, as detailed above, because the minimum required width of the fire lane was expressly stated as a condition of approval, the condition may be revised only if a new tentative PUD application is filed.

2. No Bicycle Parking is Shown on the Site Plans or Within Building Plans.

The tentative PUD approval for Phase V required covered and lockable parking for at least two bicycles, and condition 2 of the final PUD implements the tentative approval. The bicycle parking that is shown on the A0.1 Site Plan does not include information regarding the number of bicycle parking spaces provided.

Another defect with the proposed bicycle parking is it is not located in compliance with Eugene Code 9.6105(3), which requires long and short term bicycle parking to be "no farther than the closest automobile parking space (except disabled parking)."

3. Changes to Design Team.

The City's code requires the developer to employ the services of a design team and to retain that team subsequent to final approval through the course of construction to ensure that construction is consistent with the proposal and approvals. Eugene Code 9.510(9) and 9.8310(2). Members of the design team may be replaced only upon written approval of the City. Failure to retain the design team is a basis for revoking the PUD. *Id.*

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The Willamette Oaks project has had an interchanging of design team members, and based upon the records we have reviewed, prior written approval has not been obtained. Prior to approving any construction plans for Phase V, the burden of proof is on the developer to demonstrate that the entirety of the approved design team has been retained, or the required written approvals have been obtained.

4. Changes to Site and Building Plans.

Several elements of the proposed building significantly differ from the plans relied upon and approved by the Approved PUD, including:

A. The amount of parking required for Phase V was an issue in the Approved PUD, and ultimately the City allowed Phase V to include only 21 new parking spaces (in addition to the existing 114 spaces), which was less than the code requirement. Three of the new spaces are not located on the subject property because they are either off-site or crossed by the property line. Therefore, they are not required parking spaces on the site for purposes of complying with the Approved PUD, so the proposed site plan lacks 3 of the required 21 parking spaces. Additionally, the function of the Phase V building has been changed to memory care, which has different parking requirements – 1 parking space is required for every 4 beds, so 4 parking spaces and one handicapped space are required for the 14-bed memory care use.

B. Only 1 handicapped parking space is shown. ORS 447.233(2)(a) requires 2 handicapped parking spaces, and the memory care use requires a third handicapped space. The handicapped parking space requirements are based upon state and federal laws related to accessibility. If Willamette Oaks seeks to deviate from these requirements, it has the burden of demonstrating why they do not apply.

Conclusion.

For the reasons stated above, the Application fails to meet the approval criteria for a minor modification under EC 9.516(9) (1971). To reiterate, the Planning Director “may” approve, but is not required to approve, any minor modification and should decline to do so in this instance. Even if the current approval criteria for a modification to an approved PUD were applicable, the same reasons discussed above form the bases for denial of this Application. The current approval criteria are the same criteria analyzed in Sections C.2 and C.3 above, and the restriction on time extensions discussed in Section C.1 is applicable to every application for development.

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4. Time Extensions Under Phase V PUD Agreement.

As previously mentioned, this Application must meet the approval criteria of the Eugene Code (discussed above), as well as the approval criteria for a time extension under the Phase V PUD Agreement. As discussed in more detail below, the Application also fails to meet the time schedule under the modified Phase V PUD Agreement.

- a. *The extension provision has been superseded, such that no further time extensions are authorized.*

Originally, the Phase V PUD Agreement allowed construction schedule time extensions if delay in construction was caused by a proceeding challenging the granting of the approval or by a cause reasonably beyond the control of the Developer. Specifically, the original Phase V PUD Agreement provided a time schedule as follows:

“1. DEVELOPMENT STANDARDS

- a. Time Schedule: Time being of the essence, the construction will commence by April 15, 1999, and total construction, including landscaping, shall be completed on or before September 17, 2001. These dates shall be part of the development schedule within the meaning of Sections 9.510 of the Eugene Code, 1971 (or the corresponding provision of any future such law). Notwithstanding the foregoing development schedule, the time for completion shall be extended by the period of time commencement or completion of construction is delayed on account of any suit, action or other proceeding challenging the granting of project approval or the right project, or on account of any strike, lockout, civil commotion, military activity, sabotage, or inability to obtain materials, labor, or service, natural disaster or casualty, or any other cause reasonably beyond the power of the Developer to control or lessen the effect thereof upon commencement or completion.”

However, the Phase V PUD Agreement was modified by MDA 07-1, which removed the ability to extend the time schedule. Specifically, MDA 07-1 provides, in relevant part:

“In accordance with the approved modification, the time schedule included in the original agreement (Development Standards, Section 1.a) is revised as follows:

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Time Schedule: Time being of the essence, the commencement of construction for Phase V shall occur by August 1, 2010, with the completion of Phase V construction by August 1, 2011."

As shown above, the express language of MDA 07-1 revises and replaces, in its entirety, "Development Standards, Section 1.a" of the Phase V PUD Agreement. In essence, MDA 07-1 deleted the provisions allowing Willamette Oaks a construction schedule extension if delay was caused by a proceeding challenging the PUD approval or by a cause reasonably beyond the control of the Developer. Given that the Approved PUD obtained original approval back in 1997, it is not surprising that a decade later, in 2007, the City chose to delete the provisions of the Phase V PUD Agreement relating to construction schedule extensions. Notably, Willamette Oaks did not challenge such deletion. Since the extension provisions have been deleted by the modified Phase V PUD Agreement, Willamette Oaks cannot rely on such provisions as the basis for the present extension request.

b. In the alternative, construction delay was not caused by legal proceedings.

Alternatively, even if the Planning Director finds that such provisions have not been deleted and remain in full force and effect, Willamette Oaks has failed to show that construction was delayed "on account of" a proceeding challenging the granting of project approval or "the right project," or by a cause "reasonably beyond the power of the Developer to control or lessen the effect thereof upon commencement or completion."

There is no dispute that Goodpasture requested that the Planning Director issue an interpretation that the Approved PUD had expired, that the Planning Director's decision was appealed to LUBA, and that LUBA's decision was then appealed to the Court of Appeals. However, at no time did LUBA or the Court of Appeals stay the Approved PUD or prohibit the City from processing or issuing permits. Additionally, at no time did the City authorize a "hold" on processing any of Willamette Oak's permit applications or refuse to issue permits. To the contrary, two permits were issued by the City to Willamette Oaks *after* the request for Planning Director interpretation had been filed. The Planning Director interpretation request was filed on April 5, 2011. According to City records, an Erosion Control permit was issued on May 19, 2011 and a "Phase I" - tree removal, grading and utilities permit was issued on June 6, 2011.

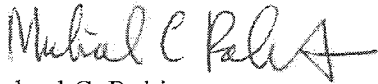
Since the application for a Planning Director interpretation and subsequent appeals did not stay the Approved PUD or prevent the City from processing or issuing permits, any delay in construction was not caused "on account of" legal proceedings or by causes reasonably out of the Developer's control. Therefore, Willamette Oaks is precluded from relying on the Phase V PUD Agreement as the basis for authorization of its requested construction schedule extension.

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D. Conclusion.

Goodpasture respectfully requests that the City deny Willamette Oaks' request for a minor modification to the Phase V PUD Agreement to extend the construction schedule by 10 months. The 16-year old Phase V PUD construction schedule has already been extended 14 years, 11 of which were at the request of Willamette Oaks, and the Application fails to comply with the Eugene Code's restriction on time extensions. Moreover, because the changes proposed in Willamette Oaks' plans either conflict with a condition of approval, conflict with Phase V PUD approved plans, or are significant changes to the development, its request for a construction schedule extension should be denied. Such modifications may not be approved as a modification to an approved PUD; a new tentative PUD application is required. Eugene Code 9.8335 and 9.8370. Finally, the provisions of the Phase V PUD Agreement authorizing a time extension have been superseded by language that does not authorize further time extensions, and the Application fails to otherwise comply with the Phase V PUD Agreement regarding time extensions. For all of the reasons discussed above, the Planning Director should deny this Application.

Very truly yours,



Michael C. Robinson

MCR:cr1

Enclosures

cc: Ms. Emily N. Jerome (via email) (w/encls.)
 Mr. Steve Ochs (via email) (w/encls.)
 Mr. Glenn Klein (via email) (w/encls.)
 Ms. Dana L. Krawczuk (via email) (w/encls.)
 Mr. Seth J. King (via email) (w/encls.)
 Mr. Cody M. Weston (via email) (w/encls.)

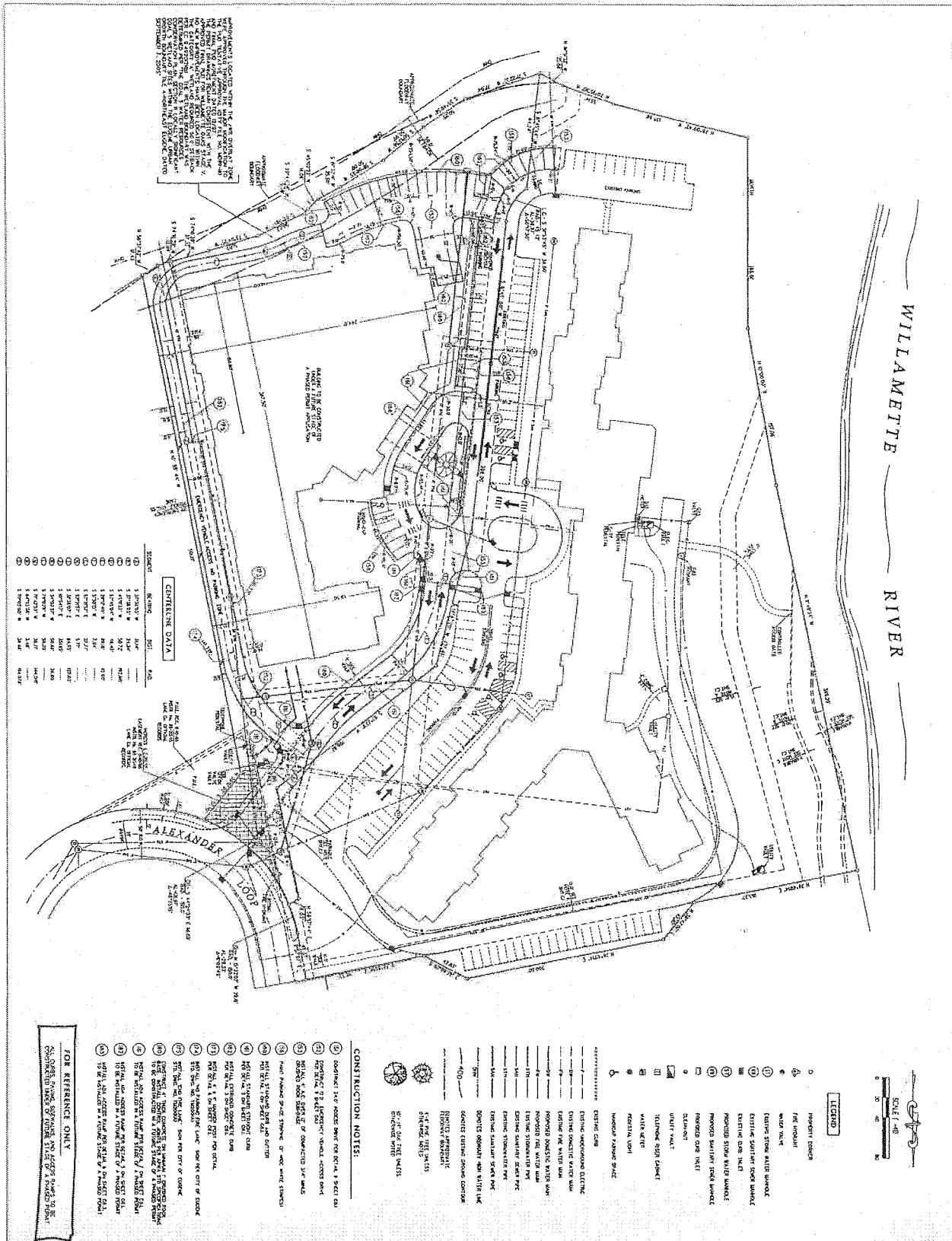


EXHIBIT A

TB&G
ARCHITECTS &
PLANNERS / P.C.

102 East Broadway
Suite 200
Eugene, Oregon 97401
(541) 467-7071
Fax (541) 687-0025

PERMIT PACKAGE #1

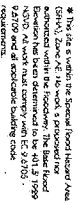
WILLAMETTE OAKS PHASE V
ADVENT GROUP, INC.

ALEXANDER LOOP
EUGENE, OR
ASSESSOR'S MAP NO. 7-04-24-10-0001 TL No. 1702

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① MAJOR MODIFICATION TO THE ISSUANCE CONDITIONS OF APPROVAL.

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SEMANTIC AND CONNOTATIONS OF "SUPPORTIVE" AND "CARE" IN PWD ADAPTATION

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2. The Commission set up a task force, the External Review Group, to study the Commission's procedures for the selection of the independent expert and the independent reviewer. The External Review Group was set up as a private sector body, but the Commission retained the right to appoint and remove its members. The External Review Group consisted of a chair and six members, three of whom were independent of the Commission. The External Review Group was to advise the Commission on the selection of the independent expert and the independent reviewer. The External Review Group was to be established by the Commission by the end of 1997.
3. The Commission set up a task force, the External Review Group, to study the Commission's procedures for the selection of the independent expert and the independent reviewer. The External Review Group was set up as a private sector body, but the Commission retained the right to appoint and remove its members. The External Review Group consisted of a chair and six members, three of whom were independent of the Commission. The External Review Group was to advise the Commission on the selection of the independent expert and the independent reviewer. The External Review Group was to be established by the Commission by the end of 1997.
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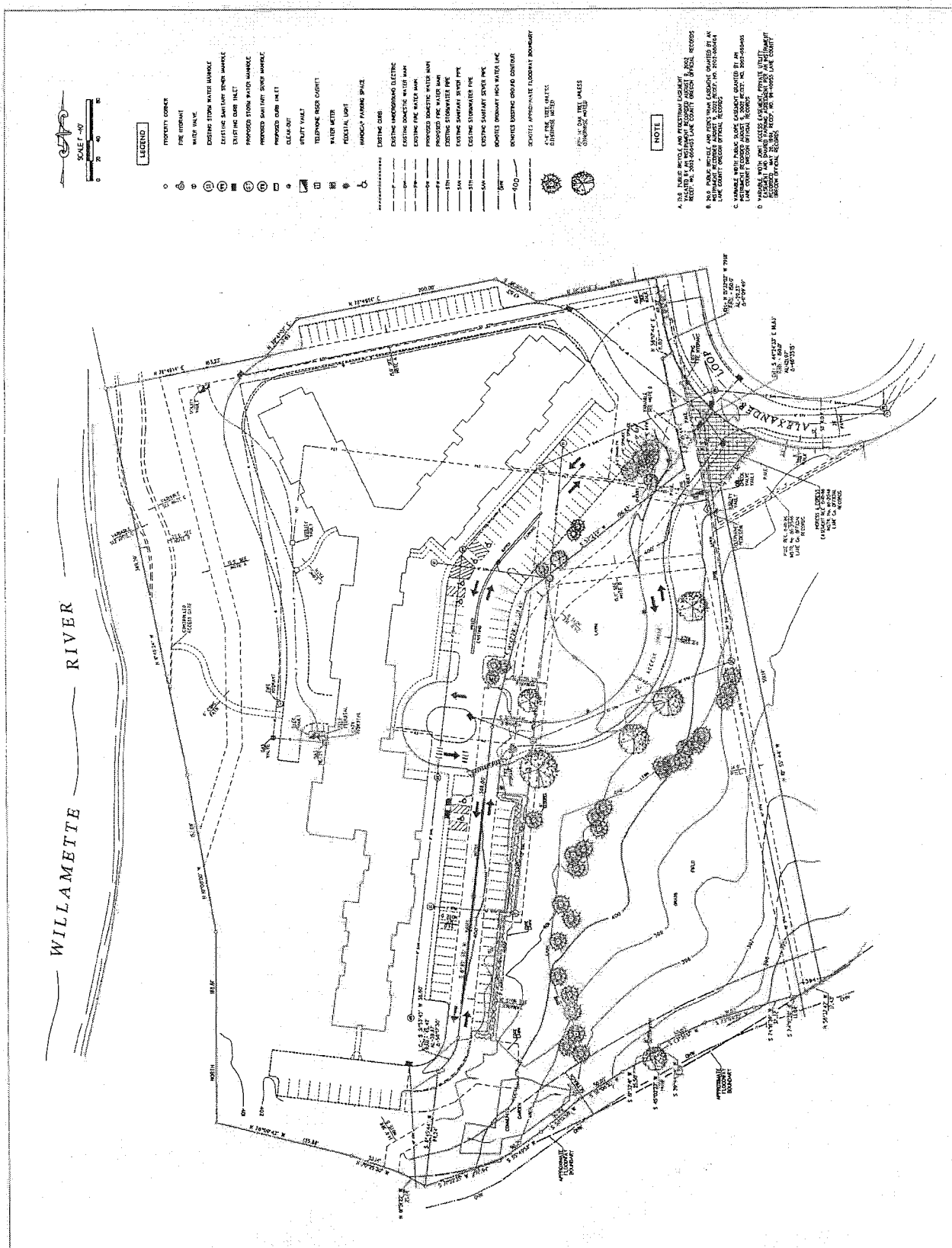
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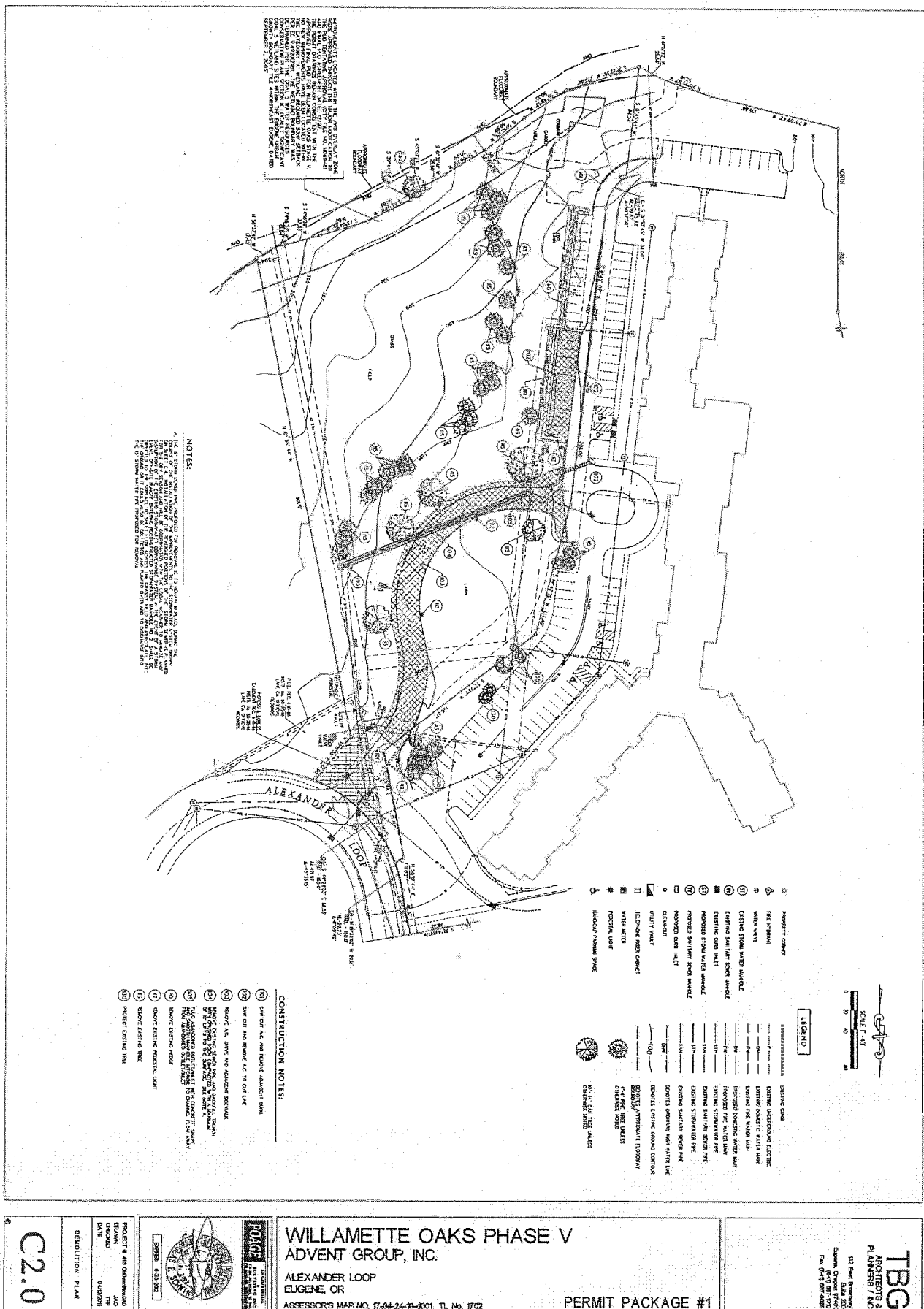
- RESEARCHER: "I believe the evidence indicates that a 10% increase in the number of people who use the bus will result in a 10% increase in the number of people who use the bus."

First Impressions are Strongly on Our Minds

FOR REFERENCE ONLY
ALL SITE CONCRETE & PAVING TO BE CONSTRUCTED UNDER A
FUTURE STAGE OF A PHASED PERMIT

HO Agenda - Page 41





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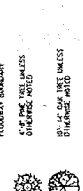
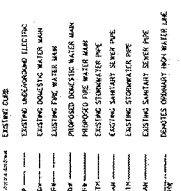
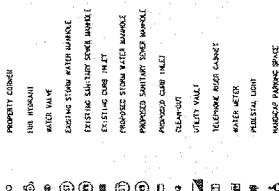
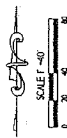
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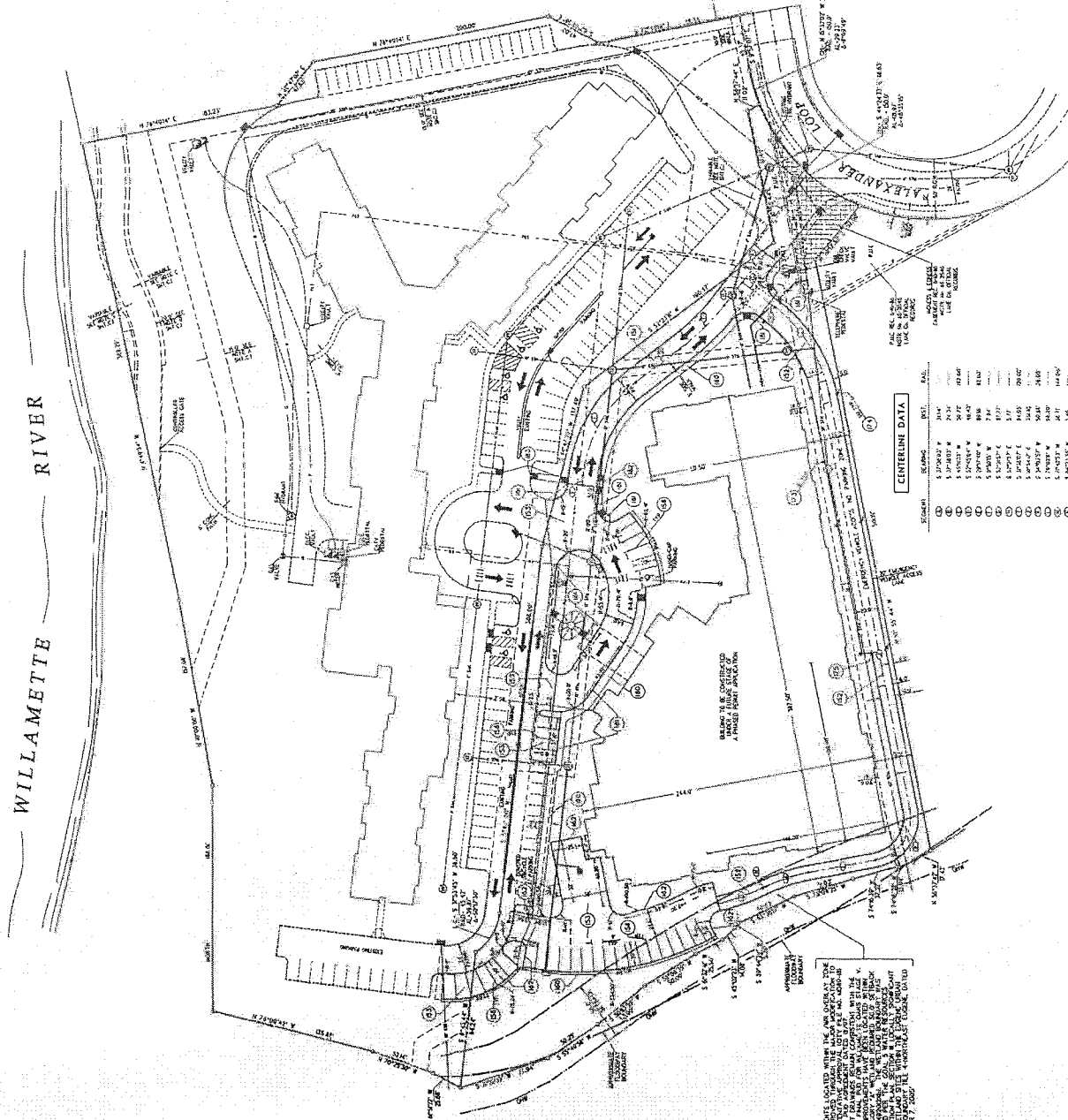


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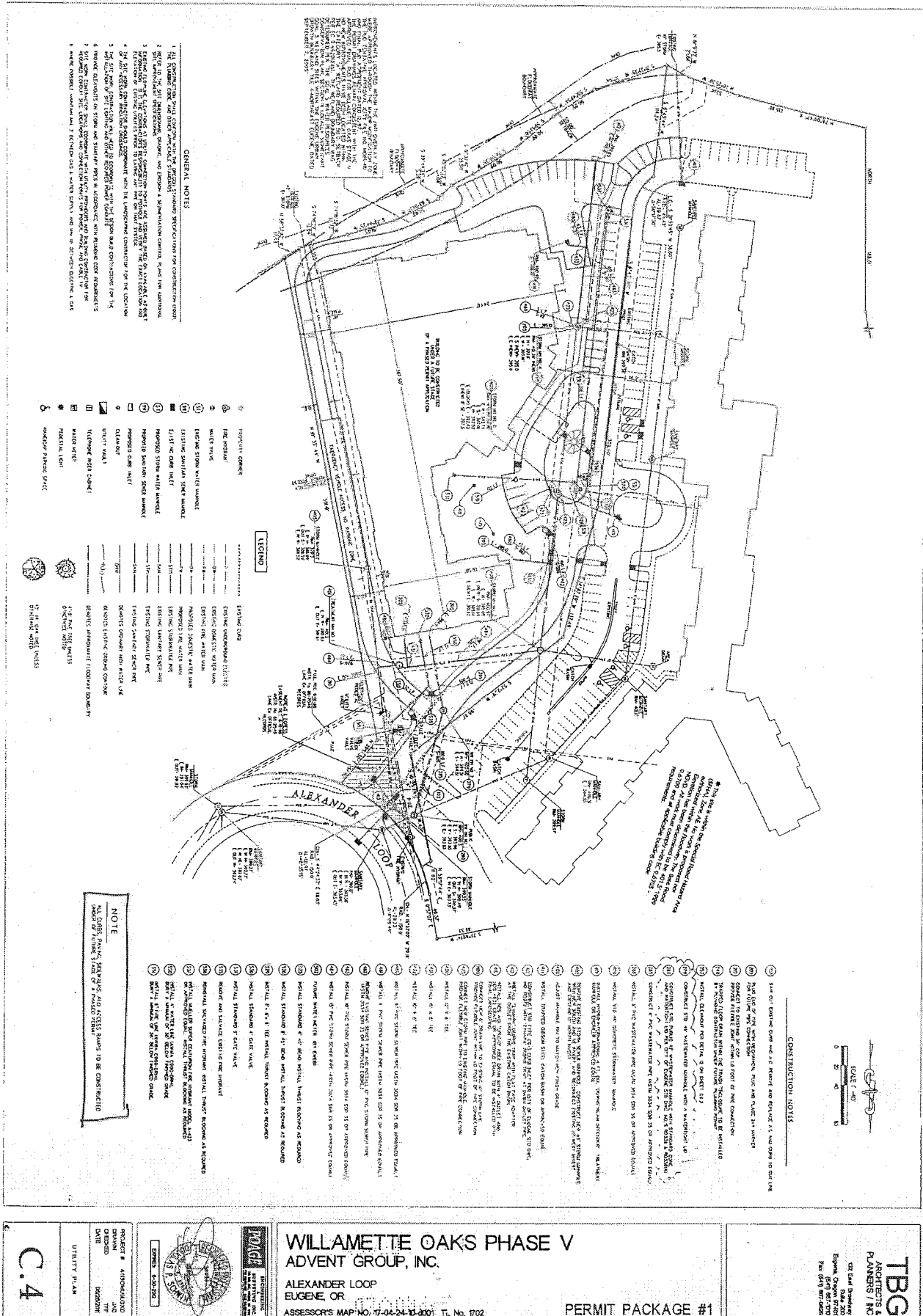
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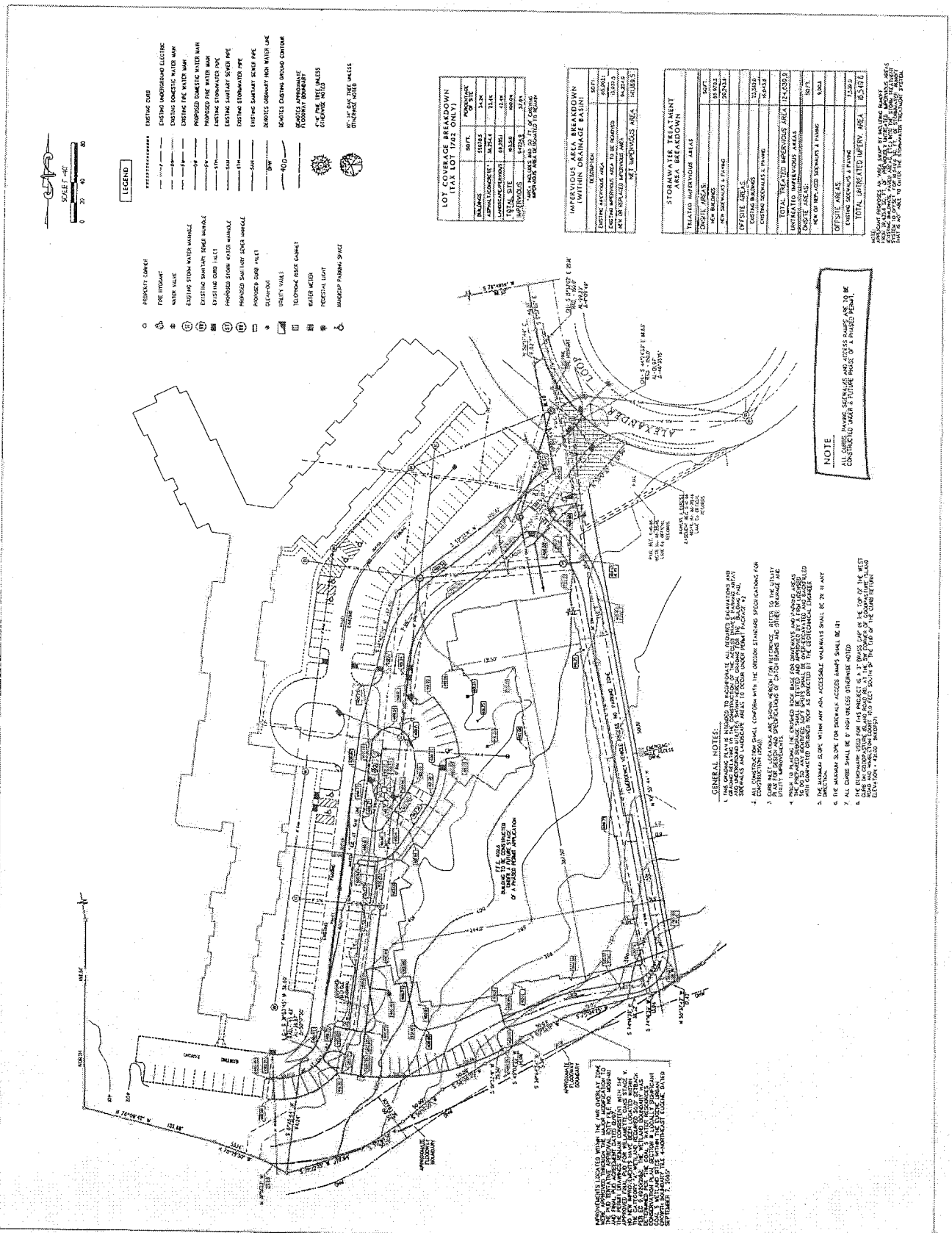
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CORRECTED
FINDINGS OF THE HEARINGS OFFICIAL
ON APPEAL OF THE
PLANNING DIRECTOR'S
MINOR MODIFICATION DENIAL

**Minor Modification to Willamette Oaks Planned Unit Development, Phase V
(MDA 00-6)**

Property: Assessor's Map 17-04-24-10; Tax Lots 1701; 1702

Zoning: R-2/PD, Limited Multiple Family Residential with Planned Unit Development overlay district.

Location: 455 Alexander Loop, south of Goodpasture Island Road and east of the Willamette River

Request: Approval of a minor modification to Phase V of the Willamette Oaks PUD to extend the construction commencement from April 15, 2000 to January 15, 2001

Applicant: Curtis W. Reeve, Willamette Oaks Associates

Representative: James W. Spickerman, Gleaves, Swearingen, Larsen, et al.

The following findings of fact and conclusions of law are based upon testimony presented at the public hearing of July 5, 2000, and all materials and documents submitted and made part of the planning department file through the close of the record on that date.

CONCLUSION: The Planning Director's decision is reversed. The requested Minor Modification to the Willamette Oaks PUD is approved.

DISCUSSION AND FINDINGS:

Background

The Willamette Oaks PUD was granted tentative approval for a two-phase PUD, and final PUD approval for Phase I, in 1996. In 1997, a minor modification was granted to allow Phase II to be divided into sub-phases II, III, IV and V, and final approval was granted for sub-phases II, III and IV. The approval specified that Phase V would be reviewed through a separate Final PUD application. In 1990, a Major Modification was approved to allow Phase V to be developed as an assisted living facility, rather than the originally approved retirement development designed for independent living. In 1995, a 30-month extension to the Major Modification decision was granted to allow for submittal of a Final PUD Plan application by August, 1997. A Final Plan application for Phase V was filed in July, 1997 and approved

in September, 1997. In November, 1997, the PUD agreement was finalized, providing for commencement of construction by April 15, 1999 and completion of construction by September 17, 2001. In March, 1999, the applicant requested an extension for construction commencement to April 15, 2000, which was administratively granted. In December, 1999 the applicant requested another extension of the commencement date, from April 15, 2000 to September 17, 2001, and an extension of the construction completion date from September 17, 2001 to September 17, 2002. The planning staff responded that such a requested required the submittal of a minor modification request.

The applicant filed a minor modification request on April 13, 2000, requesting an extension of the construction commencement date from April 15, 2000 to January 15, 2001. The request did not include an extension of the September 1, 2001 completion date. On May 12, 2000, the Planning Director denied the modification request, finding that the requested extension failed to satisfy two of the three criteria for minor modification approval. The applicant appeals the Planning Director's denial.

Issues on Appeal

The applicant's appeal statement challenges the Planning Director's findings that the requested minor modification fails to satisfy two criteria for minor modification approval. Those criteria require that the minor modification (1) is "consistent with the conditions of the original approval"; and (2) that the decision, as modified, will "remain consistent with applicable permit criteria."

The Planning Director determined that the minor modification was not consistent with the conditions of the original approval because the applicant had not established how the extension satisfied a provision of the PUD agreement, which was executed in satisfaction of an approval condition. She determined that the modification would not remain consistent with the applicable permit criteria because pertinent code standards have changed since the PUD was originally approved. Based upon the written argument in the applicant's appeal statement, a June 26, 2000 staff memorandum regarding the appeal acknowledges:

"The applicant provides reasonable arguments as to why the Planning Director findings may have been in error with regard to how the proposed PUD change addresses 9.615(9)(e)(1)(a) and (c). Even if the modification appears to comply with these standards, however, the code provides the Planning Director discretion as to whether to actually approve the requested modification. The code clearly indicates that minor modifications may be approved by the Planning Director. In this case, the Planning Director denial is intended to prevent continued, multiple extensions to the schedule for completing the PUD based on the fact that significant changes have been made to the Land Use Code and a significant time has elapsed since the original tentative PUD was approved and public notice of the proposal was provided.

"Staff recommends that the hearings Official deny the appeal and uphold the decision of the Planning Director. If the Hearings Official reverses the decision of the Planning Director and grants the minor modification, staff recommend that the decision be modified to clearly indicate as a condition of approval inclusion of text in an amendment to the PUD agreement, or through some alternative mechanism, that any further changes proposed by the applicant to the schedule will require a major modification application and thus compliance with existing PUD criteria, including Land Use Code standards in effect at the time of the PUD modification application submittal."

Evaluation**Applicable Criteria**

Eugene Code (EC) Section 9.516(9)(e)(1) requires evaluation of proposed PUD minor modifications for compliance with the following criterion:

Section 9.512(9)(e)(1): These modifications, including extension of construction time schedules or completion schedules and minor site plan revisions may be approved by the planning director upon a finding that the changes:

- a. **Are consistent with the conditions of the original approval;**

FINDING: The only condition of the final approval of Phase V of the Willamette Oaks PUD relating to timelines is Condition of Approval 1(d), which requires:

“A specific schedule indicating number of phases, construction to be completed each phase, and time period of each phase, must be submitted by the applicant. Absent an approved schedule as specified, and per Eugene Code 9.510(4), the applicant shall be required to obtain all approvals for necessary building permits within one year of the decision date of this final approval of Phase V development. The final executed PUD agreement shall further specify the time schedule by which all construction shall be completed.”

The Planning Director’s decision acknowledges that this condition was satisfied through the applicant’s execution of the PUD agreement. However, the Planning Director’s determination that that this sub-criterion was not satisfied is based on her finding that the applicant had not sufficiently justified the extension pursuant to a provision of the PUD agreement. That PUD agreement, however, is not a condition under which this modification request is evaluated. That PUD Agreement was a condition of the original approval, which was satisfied through the execution of the Agreement.

Moreover, both the PUD Agreement and the condition upon which it is based regulate construction completion, not commencement. The condition requires that the PUD “specify the time schedule by which all construction shall be completed.” In turn, the PUD Agreement allows the time for completion to be extended if the time for construction or completion is delayed by circumstances beyond the developer’s control. Neither of these restricts extensions of the commencement date, which is the only requested modification in this case.

The city has not established that the requested modification of the construction commencement date is not consistent with the conditions of the original approval. Rather, the evidence in the record reflects that the proposed modification will remain consistent with the conditions of that approval. This sub-criterion is satisfied.

- b. **Result in insignificant changes in the outward appearance of the**

development and impact on the surrounding properties.

FINDING: As the Planning Director found, the requested extension of commencement of the construction of Phase V will not result in a change to the outward appearance of the development or impact on the surrounding properties. This sub-criterion is satisfied.

c. Remain consistent with applicable permit criteria.

FINDING: The Planning Director determined that this sub-criterion was not satisfied because provisions of the Eugene Code have changed since the major modification of Phase V was approved in 1990, and the applicant has not established that Phase V, as proposed, satisfies the current code. The determination appears to be based upon an application of the major modification requirements, rather than the minor modification requirements at issue here. As the Planning Director's decision notes, major modifications are evaluated for compliance with the criteria for tentative PUD approval, as those criteria are in effect at the time of the major modification request. However, the minor modification requirements do not require evaluation for compliance with the current code. Rather, the applicable criteria under which this minor modification is subject are those in effect at the time of approval of the PUD. (See ORS 227.178(3).) The Planning Director erred in evaluating the proposed minor modification against the current code criteria.

The Planning Director's decision does not establish, nor is there any evidence in the record, that the proposed construction commencement extension renders Phase V inconsistent with the permit criteria applicable to this PUD. This sub-criterion is satisfied.

Additional Issues

As noted above, planning staff recommend that, notwithstanding compliance with the three sub-criteria of EC 9.516(9)(e)(1), the requested modification should be denied because "the code provides the Planning Director discretion as to whether to actually approve the requested modification. The code clearly indicates that minor modifications may be approved by the Planning Director." The staff note that the "intent" of the denial is to "prevent continued, multiple extensions to the schedule for completing the PUD based on the fact that significant changes have been made to the Land Use Code and a significant time has elapsed since the original tentative PUD was approved and public notice of the proposal was provided."

First, it should be noted that this modification request does not implicate the city's concern regarding multiple extensions to the schedule for completing a PUD. This request modifies only the commencement, and not the completion, date. As importantly, the use of the word "may" in a criterion for approval of a minor modification does not confer on the Planning Director unfettered discretion to deny a request notwithstanding compliance with all approval criteria. Nor does it allow the application of additional, unstated and unadopted requirements to the approval criteria. The criteria under which any individual request is to be evaluated must be legislatively established prior to their implementation. Thus, resolution of the city's concern over multiple extensions to PUD completions must be addressed legislatively, through code amendments. Absent those amendments, the concern cannot be resolved through a modification request. Notwithstanding the permissive code language, the city cannot add additional, unadopted requirements to the approval criteria, and use those unadopted requirements as a

basis to deny the request.

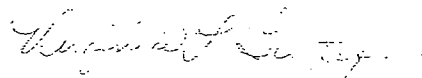
Next, the city staff recommend that "the decision be modified to clearly indicate as a condition of approval inclusion of text in an amendment to the PUD agreement, or through some alternative mechanism, that any further changes proposed by the applicant to the schedule will require a major modification application and thus compliance with existing PUD criteria." However, conditions of approval must be based upon and required to ensure compliance with an approval criterion. There is no approval criterion applicable to this minor modification that is dependent upon, or could be read to require, as a condition of approval, that any potential future schedule be processed as a major modification. To the contrary, the minor modification approval criterion explicitly states that an "extension of construction time schedules or completion schedules" fall within the definition of a minor modification.

The city cannot dismiss or override the definition of what constitutes a minor modification through a condition of approval. Nor can the city add requirements unrelated to approval criteria as conditions of approval. Again, to the extent the city is to address concerns regarding scheduling extensions, the city's recourse is through code amendments.

Conclusion

The record indicates that the proposed minor modification to Phase V of the Willamette Oaks PUD, to extend the construction commencement date from April 15, 2000 to January 15, 2001 satisfies all applicable minor modification criteria. The decision of the Planning Director is reversed, and the requested modification is approved.

Respectfully submitted,



Virginia L. Gustafson
HEARINGS OFFICIAL

NOTICE OF APPEAL RIGHTS: This decision may be appealed to the Land Use Board of Appeals, within 21 days of the mailing of this decision, in accordance with the appeal procedures set forth in ORS Ch. 197 and OAR Ch. 661, Div. 10.